Jurisdictional Statement

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No 81-1259

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

WESTERN MARYLAND RAILWAY COMPANY,
a corporation, APPELLANT

v.

Herschel H. Rose, III,
~~THOMAS R. GOODWIN~~, Tax Commissioner
of the State of West Virginia, APPELLEE

On Appeal from the Supreme Court of Appeals
of West Virginia

JURISDICTIONAL STATEMENT STATE CIVIL CASE

NOEL P. COPEN
COUNSEL OF RECORD
FOR APPELLANT
Huddleston, Bolen, Beatty,
Porter & Copen
P. O. Box 2185
Huntington, West Virginia 25722
(304) 529-6181

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QUESTIONS PRESENTED

Does West Virginia Code § 11-12A-6(3) represent a delegation of legislative authority or the delegation of administrative discretion without an ascertainable standard for the exercise of such discretion in abridgement of the appellant's due process rights under the 14th Amendment to the Constitution?

Does the State Tax Commissioner's failure to follow administrative regulations promulgated by his department in the computation of net transportation income constitute a violation of the appellant's due process rights under the Fourteenth Amendment?

Because of the interrelationship between the West Virginia Carrier Net Income Tax and the West Virginia Corporate Net Income Tax, does the disallowance of the appellant's net operating loss deductions under West Virginia Code § 11-12A-3 violate the appellant's equal protection guarantees under the Fourteenth Amendment?

Does the gross income tax levied on the appellant's interstate activity in West Virginia by virtue of West Virginia Code § 11-12A-2 impose an unconstitutional burden on interstate commerce by violating the Commerce Clause protections against multiple taxation?

DESIGNATION OF CORPORATE RELATIONSHIPS

The Western Maryland Railway Company, a Maryland corporation, filing this jurisdictional statement in this proceeding, states that:

This is its original Designation of Corporate Relationships.

The CSX Corp., a Virginia corporation, is the parent of Western Maryland Railway Company.

Western Maryland Railway Company does not have an ownership interest in any subsidiaries (excepting wholly-owned subsidiaries).

Western Maryland Railway Company does not have any affiliates.

Dated: January 5, 1982.

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IN THE SUPREME COURT OF THE
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OCTOBER TERM, 1981

WESTERN MARYLAND RAILWAY COMPANY,
a corporation, APPELLANT

v.

THOMAS R. GOODWIN, Tax Commissioner of
the State of West Virginia, APPELLEE

Jurisdictional Statement — State Civil Case

Opinions Below

The opinion of the West Virginia Supreme Court of Appeals, entered on July 17, 1981, petition for rehearing denied on October 8, 1981, and the opinion of the Circuit Court of Kanawha County, West Virginia are set out in the Appendix hereto, along with the Administrative Decision of the Tax Commissioner of the State of West Virginia rendered on July 5, 1977. The decision of the West Virginia Supreme Court of Appeals is reported as *Western Maryland Ry. Co. v. Goodwin*, 282 S.E.2d 240 (W.Va., 1981).

Jurisdiction

This action represents an appeal from an administrative decision of the Tax Commissioner of the State of West Virginia whereby the appellant was assessed additional Carrier Income Tax under West Virginia Code §§ 11-12A-2 and 11-12A-3. The validity of each of these sections is challenged on a number of constitutional grounds. The disallowance of the appellant's net operating losses in computing the tax due under West Virginia Code § 11-12A-3 discriminates against taxpayers such as the appellant in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. Due to the interrelationship of the Carrier Net Income Tax provisions of § 11-12A-3 and the Corporate Net Income Tax provisions of West Virginia Code § 11-24-9, the appellant is denied the tax treatment afforded similarly situated corporate taxpayers of the same class as the appellant.

The assessment of the Carrier Income Tax against the appellant in this case also draws into question the validity of West Virginia Code § 11-12A-6 on the grounds that the discretion granted to the Tax Commissioner in computing the net transportation income upon which the tax of § 11-12A-3 is based is not delegated pursuant to an ascertainable standard under which the discretion is to be exercised and therefore constitutes a denial of due process under the Fourteenth Amendment to the Constitution of the United States. In addition, the Tax Commissioner's disregard of his own administrative regulations in computing the appellant's net transportation income for Carrier Net Income Tax purposes constitutes a further denial of due process under the Fourteenth Amendment to the Constitution of the United States.

In addition to West Virginia Code § 11-12A-3, the validity of West Virginia Code § 11-12A-2, whereby a tax is imposed on the gross income of certain carriers, is drawn into question by reason of the fact that the tax, as applied to the appellant, constitutes an unreasonable burden on interstate commerce in violation of the Commerce Clause of the Constitution.

Each of the aforesaid federal constitutional questions was timely raised by the appellant at the appropriate stage of the proceedings in this case. On January 3, 1979, the Circuit Court of Kanawha County, West Virginia held for the appellant in overruling the assessment of the State Tax Commissioner with regard to the gross tax on carrier income under Section 2 and with respect to the appellant's net operating loss in calculating the net transportation income for the purposes of the tax under Section 3. On July 17, 1981, the West Virginia Supreme Court of Appeals reversed, holding that the gross tax on the income of the appellant under Section 2 was nondiscriminatory and did not impose an unreasonable burden on interstate commerce. The Court refused to hold that the disallowance of the net operating loss of the appellant in computing the net transportation tax under Section 3 discriminated against the appellant. The Court also refused to hold that the appellant was denied due process by reason of the exercise of the Commissioner's discretionary powers in computing the appellant's net transportation income or by the Commissioner's disregard of the administrative regulations adopted by the State Tax Department in making the aforesaid computation.

A timely petition for rehearing, filed by appellant on August 14, 1981, was denied by the West Virginia Supreme Court on October 8, 1981. Notice of appeal to this Court was timely filed on December 23, 1981.

The jurisdiction of the United States Supreme Court to review this decision of the West Virginia Supreme Court of Appeals on appeal is conferred by 28 U.S.C. § 1257(2). The following decisions sustain the jurisdiction of the United States Supreme Court to review the judgment on appeal in this case: *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979); *American Oil Co. v. Neill*, 380 U.S. 451 (1965); *Central Railroad Company of Pennsylvania v. Pennsylvania*, 370 U.S. 607 (1962).

Constitutional and Statutory Provisions

The Fourteenth Amendment to the Constitution of the United States provides in Section 1 as follows: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. amend. XIV, §1.

The relevant portions of the Commerce Clause of the Constitution, as found in Article I, Section 8, provide as follows: The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes; U.S. Const. art. I, §8.

The relevant provisions of 49 U.S.C. § 11503(b) are contained in the Appendix hereto.

The relevant West Virginia statutes, West Virginia Code §§ 11-12A-2, 11-12A-3, 11-12A-6, 11-24-4, 11-24-6 and 11-24-9 are contained in the Appendix hereto.

Maryland Ann. Code Art. 81, Sec 129 is contained in the Appendix hereto.

West Virginia Annual Tax on Incomes of Certain Carriers (ATC) Regulations §§ 1.3 and 1.4 are contained in the Appendix hereto.

Statement of the Case

Western Maryland Railway Company, the appellant, is a freight hauling railroad carrier incorporated under the laws of the State of Maryland and qualified to do business in West Virginia. Its lines extend westward into West Virginia and Pennsylvania from Baltimore, Maryland where it operates pier facilities. During the period in question, January 1, 1970 to December 31, 1973, the appellant received income from a number of transportation activities, including income from switching services performed and from tariffs levied against its customers for the undue detention of its cars, referred to as demurrage.

Switching income during the audit period consisted of the appellant's revenue from switching of cars between connecting line haul tracks and switching between line haul tracks and local industries. During the period in question, the appellant had four stations within West Virginia which could perform switching services. The stations were located at Bellington, Durban, Elkins, and Hutchinson, West Virginia and the Luke, Maryland switching district also included West Virginia activity. During the period in question, however, no switching activity took place at the Bellington station, and all the switches performed at the Luke, Maryland district station involved switch movements from tracks in West Virginia to tracks in Maryland or vice versa. All of the switching activity at the appellant's Durban, West Virginia station was in connection with interstate movements which originated on the appellant's line for connection with the C&O Railway and whose ultimate destination was Covington, Virginia. All the switching activity of the appellant at Elkins, West Virginia was between its line and the B&O Railway, some of which were interstate movements and some of which were intrastate movements. The switching services performed at Hutchinson, West Virginia consisted of coal shipments originating on the appellant's line for transfer to the B&O Railroad for both interstate and intrastate shipments. Only those switching services which were a part of an interstate movement were disputed with respect to the assessment issued by the State Tax Commissioner.

The appellant's revenue from demurrage during the audit period consisted of charges for undue detention of cars based on lawful tariffs regulated by either the Interstate Commerce Commission or the West Virginia Public Service Commission. As with the switching services, the revenue from demurrage was classified by the appellant as either intrastate or interstate depending on the nature of the previous or subsequent line haul portion of the movement of the cars, since the services were rendered as an actual, direct and intergal part of the total movement. The rates for demurrage incident to an interstate movement were within the sole jurisdiction of the Interstate Commerce Commission pursuant to 49 U.S.C. Section 1 *et seq.* The rates for demurrage incident to an intrastate movement - i.e., one wholly within West Virginia, were subject to the jurisdiction of the

West Virginia Public Service Commission by virtue of West Virginia Code § 24-2-1 *et seq.* As with the dispute over taxation of switching services, only demurrage which was a part of an interstate movement of railroad cars was at issue in this case.

During the years covered by the audit, the appellant reported its income from what it designated interstate switching and demurrage under West Virginia Code § 11-12A-3 for Carrier Net Income Tax purposes. The State Tax Commissioner, based upon an audit of the appellant, adjudged that the switching services performed wholly within West Virginia and the demurrage tariffs resulting from detention of cars by patrons in West Virginia, regardless of the connection with interstate commerce, were subject to the West Virginia Code § 11-2A-2 Carrier Gross Income Tax on transportation business beginning and ending wholly within West Virginia. A portion of the December 8, 1975 assessment against the appellant resulted from the foregoing reclassification of the appellant's income.

The appellant computed its net transportation income for purposes of the Carrier Net Income Tax under West Virginia Code § 11-12A-3 for the year 1971 in accordance with federal income tax methods, without items of non-transportation income or expense considered, resulting in a net operating loss for that year. Portions of such loss were carried back to 1970 and forward to 1972 and 1973, so that the appellant showed no West Virginia net transportation income for those years. After the audit, the Tax Commissioner ruled that the loss carrybacks and carryforwards were inappropriate in computing West Virginia Carrier Net Income Tax and he reassessed the appellant's taxes after disallowing the loss deductions.

On July 5, 1977, the Tax Commissioner of the

State of West Virginia issued an administrative decision upholding the assessment issued by his department on December 8, 1975 for the Carrier Income Tax as described above. On January 3, 1979, the Circuit Court of Kanawha County, West Virginia held for the appellant in overruling the assessment of the State Tax Commissioner with regard to the gross tax on carrier income under West Virginia Code § 11-12A-2 and with respect to the appellant's net operating loss deductions in computing the net transportation income upon which the West Virginia Code § 11-12A-3 tax was based. The Kanawha County Circuit Court held that the Commissioner was bound by his own regulations in allowing the net operating losses of the appellant in computing the net transportation income under Section 3 and the Kanawha County Circuit Court reversed the assessment of the Tax Commissioner as to the gross income tax on the basis of an interpretation of the state statute.

On July 17, 1981, the West Virginia Supreme Court of Appeals reversed the Circuit Court of Kanawha County, holding that the gross tax on the income of the appellant under Section 2 was nondiscriminatory and did not impose an unreasonable burden on interstate commerce. The Court further held that the disallowance of the appellant's net operating losses in computing net transportation income under Section 3 was valid, and held that the discretion granted to the Tax Commissioner by virtue of West Virginia Code § 11-12A-6(3) was necessitated for the convenience of administering the Carrier Net Income Tax provisions of Section 3. The Court thus refused to hold that the appellant was denied due process by reason of the exercise of the Commissioner's discretionary powers in disallowing the appellant's net operating loss deductions. The Court further refused to hold that the appellant was denied due process by reason of the Commissioner's disregard of the administrative regulations adopted by the State Tax Department relative to the computation of net transportation income.

The Federal Questions Presented Are Substantial

I

> Does West Virginia Code § 11-12A-6(3) represent a delegation of legislative authority or the delegation of administrative discretion without an ascertainable standard for the exercise of such discretion in abridgement of the appellant's due process rights under the 14th Amendment to the Constitution?

West Virginia Code § 11-12A-6(3), as fully set forth in the Appendix hereto, provides that for purposes of determining the net transportation income of a carrier pursuant to the Carrier Net Income Tax levied by West Virginia Code § 11-12A-3, the West Virginia State Tax Commissioner may consider as relevant any determination of net transportation income as made by the taxpayer for purposes of the federal income tax. The material parts of that section are as follows:

> The taxpayer under this article shall file an annual return with the state tax commissioner upon a form prescribed by the commissioner setting out the following and such other information as that officer may deem necessary or useful in aid of the assessment and computation of the tax:
>
> . . . .

> (3) The net transportation income of the business wherever conducted. *For this purpose the tax commissioner may consider as relevant any determination of net transportation income as made by the taxpayer for purposes of the net income tax due the government of the United States under the laws of the United States* . . . 1967, Reg. Sess., c. 187, sec. 6 (emphasis added).

The discretion granted to the Commissioner in computing net transportation income was added by an amendment to the statute in 1967. The statute prior to the 1967 amendment, as shown below, required the Commissioner to use federal taxable income in computing the net transportation income:

> (3) The net income of the business wherever conducted. For this purpose the determination of net income for purposes of the net income tax due the government of the United States under the laws of the United States shall be taken as final. 1933 W. Va. Acts, Ex. Sess., c. 33.

Pursuant to the discretion vested in the Commissioner by West Virginia Code § 11-12A-6(3), the deductions taken by the appellant in this case for net operating losses utilized by the appellant in computing net income under the federal tax laws for the years in question were disallowed by the Commissioner in computing the appellant's carrier net income tax liability under § 11-12A-3. The broad discretion vested in the Commissioner by virtue of § 11-12A-6(3) represents an unconstitutional delegation of legislative powers by the Legislature of the State of West Virginia. Article V, Section 1 of the Constitution of West Virginia, as set out in the Appendix hereto, provides for the separate exercise of the powers vested in the respective branches of government. Article VI, Section 1 of that same constitution, as set forth in the Appendix hereto, recognizes that the power to legislate must be vested exclusively with the legislature of the State. It has long been recognized in West Virginia that the power of taxation lies exclusively in the legislative branch of government. *See*: *State v. Page*, 100 W. Va. 166, 130 S.E. 426 (1925).

This Court and the West Virginia Supreme Court of Appeals have consistently stated that the mere grant of discretion to an administrative body in the exercise of certain powers conferred by the legislative branch of government does not necessarily constitute a delegation of legislative power. *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *Quesenberry v. Estep*, 142 W. Va. 426, 95 S.E.2d 832 (1956). However, any delegation of discretion in the exercise of powers pursuant to a legislative mandate must be accompanied by ascertainable standards for the exercise of such administrative discretion. The standard by which the administrator may exercise his discretion is a necessary safeguard to assure that the administrator will act within the intent and will of the legislature. *See*: *Yakus v. United States*, 321 U.S. 414 (1944). Such an ascertainable standard is clearly lacking in the discretion granted to the State Tax Commissioner by virtue of West Virginia Code § 11-12A-6(3).

The statute in question provides no uniform rule for the exercise of the Commissioner's discretion. There is no formula or prescription to guide the circumstances under which the taxpayers' net income as determined for federal tax purposes may be used or ignored. There is no mandate that the adjustments be on a uniform basis, consistently applied to similarly situated individuals. Perhaps the most grievous omission is that the statute fails to give taxpayers such as the appellant any notice of the methods by which the tax under West Virginia Code § 11-12A-3 is to be imposed. The absence of an ascertainable standard to restrict the unbridled power of the Commissioner to expand the scope of the tax, through the exercise of administrative discretion in disallowing deductions utilized by taxpayers, such as the appellant in this case, in computing net income for federal tax purposes, is repugnant to the due process protections afforded each individual by the Fourteenth Amendment, as consistently upheld by this Court in cases such as *Wolff v. McDonnell*, 418 U.S. 539 (1974) and *Slochower v. Board of Higher Education*, 350 U.S. 551 (1956).

In summary, for the reasons cited above, the West Virginia Supreme Court of Appeals erred when it upheld the validity of the discretion granted to the Commissioner by West Virginia Code § 11-12A-6(3). Although it may be true that, as noted by the West Virginia Court, the grant of discretion to the Commissioner arose as a matter of convenience, the convenience of the State must not contravene the substantive constitutional rights of the taxpayers and must never subjugate the exclusive grant of the powers of taxation to the legislative branch of government.

II

Does the State Tax Commissioner's failure to follow administrative regulations promulgated by his department in the computation of net transportation income constitute a violation of the appellant's due process rights under the Fourteenth Amendment?

Even if it could be said that the broad discretion vested in the State Tax Commissioner by virtue of

West Virginia Code § 11-12A-6(3) constituted a valid delegation of administrative authority pursuant to an ascertainable standard for the exercise of such authority, the failure of the Commissioner to follow administrative regulations promulgated by his department in computing the appellant's transportation income constitutes a serious abridgement of the appellant's due process rights under the Fourteenth Amendment.

One of the powers that may be legitimately delegated to an administrator such as the Tax Commissioner in this case is the power to issue interpretive regulations pursuant to the legislative intent of the taxing statute. The predecessor of the appellee promulgated regulations in his capacity as State Tax Commissioner pursuant to the West Virginia Administractive Procedures Act [W. Va. Code § 29A-1-1 *et. seq.*] and such regulations were effective January 1, 1974. Specifically, Section 1.3D of those regulations, known as the Annual Tax on Incomes of Certain Carriers Regulations (ATC), provides that "net transportation income is that income computed by federal guidelines without items of nontransportation income income or expenses reflected therein." Likewise, examples 2 and 3 under Regulation ATC Section 1.4 both state that transportation net income is to be "computed by employing federal rules" or "computed by the federal method". These regulations are set forth in the Appendix.

Prior to the effective date of these regulations, the instructions on the official tax return forms provided by the State Tax Commissioner were to the same effect as the aforementioned regulations. Thus, the form for 1970 stated: "The term 'net income of the business wherever conducted' shall mean net income as determined for purposes of the net income tax due the Government of the United States under the laws of the United States, which shall be taken as final." The official forms for the years after 1970 provided for the same net transportation income as that "used for federal tax purposes." These forms were introduced into evidence during the course of these proceedings and are included in the official record of this case at pages 201-19.

It is clear that under the 1954 Internal Revenue Code in effect during the years in question, the appellant was entitled to utilize its net operating losses in computing federal taxable income under I.R.C. §§ 63(a) and 172. Treasury Regulation § 1.172-1(a) states that "Section 172 allows as a deduction in computing taxable income for any taxable year subject to the Code the aggregate of the net operating loss carryovers and net operating loss carrybacks to such taxable year." Thus, if the State Tax Commissioner had followed the regulations and instructions promulgated by his department, the appellant would have been entitled to utilize the net operating losses used in the computation of federal taxable income for the years in question for purposes of computing net transportation income under West Virginia Code § 11-12A-6(3) as the basis for the Carrier Net Income Tax imposed by West Virginia Code § 11-12A-3.

Although an administrative agency such as the West Virginia State Tax Department may amend or rescind its rules and regulations by compliance with proper administrative procedure, as long as a regulation promulgated by it remains in effect the agency and its administrator is as much bound by the regulation as the public to whom it is directed. The administrative agency may not disregard its own regulations on an ad hoc basis, since, as was noted by this Court in *Columbia Broadcasting System v. United States*, 316 U.S. 407 (1942):

> [a] valid exercise of the rule-making power is addressed to and sets a standard of conduct for all to whom its terms apply. It operates as such in advance of the imposition of sanctions upon any particular individual. It is common experience that men conform their conduct to regulations by governmental authority so as to avoid the unpleasant legal consequences which failure to conform entails. 316 U.S. at 418.

The regulations and instructions adopted by the West Virginia State Tax Department in this case as to the method of computing net transportation income served notice on taxpayers such as the appellant as to how the measure of the Carrier Net Income Tax under § 11-12A-3 was to be calculated. The regulations were mandated by our fundamental notions of due process that an individual must have notice of the law before he can be expected to comply with its terms. The regulations and instructions, once in effect, have the force of law and unless rescinded or withdrawn by proper administrative proceedings, the administrator is bound to follow the regulations and may not haphazardly disregard them as he may choose. Therefore, the West Virginia Supreme Court of Appeals erred when it failed to hold that the Commissioner's disregard of his own properly promulgated administrative regulations constituted a denial of the appellant's due process rights under the Fourteenth Amendment.

III

Because of the interrelationship between the West Virginia Carrier Net Income

> Tax and the West Virginia Corporate Net Income Tax, does the disallowance of the appellant's net operating loss deductions under West Virginia Code § 11-12A-3 violate the appellant's equal protection guarantees under the Fourteenth Amendment?

West Virginia Code § 11-12A-3 imposes a tax on the net income of certain designated carriers. The tax is levied on "every motor vehicle carrier operating on the public highways of the State and every railroad carrier, railroad car carrier, express company, pipeline company, telephone and telegraph company, airline company and any person operating a steamboat or other watercraft for the transportation of passengers or freight" doing business in the State of West Virginia. Corporate carriers are also subject to the West Virginia Corporate Net Income Tax by virtue of West Virginia Code § 11-24-4. However, West Virginia Code § 11-24-9 provides a credit against Corporate Net Income Tax liability computed under § 11-24-4 for Carrier Net Income Taxes imposed by § 11-12A-3. Thus, because of the interrelationship between these two taxing statutes, the Carrier Net Income Tax imposed by § 11-12A-3 for all practical purposes becomes the equivalent of the Corporate Net Income Tax for the corporate carriers subject to the Carrier Net Income Tax.

West Virginia Code § 11-24-3(b)(11) defines West Virginia taxable income for purposes of computing the Corporate Net Income Tax as "the taxable income of a corporation as defined by the laws of the United States for federal income tax purposes" with certain specified statutory adjustments. Thus, for purposes of the Corporation Net Income Tax, net operating loss carrybacks and carryforwards, subject to the modifications referred to in Section 11-24-6(d), are available in determining the ultimate corporate income tax due. Because the Carrier Net Income Tax is offset as a credit against Corporate Net Income Tax, the denial of net operating loss deductions to carriers in computing the Carrier Net Income Tax is patently discriminatory in violation of the equal protection guarantees of the Fourteenth Amendment.

The power of the state to tax different taxpayers at different rates cannot be denied. However, it is clear that there must be no discrimination against taxpayers of the same class and that any classification of taxpayers must have some real and substantial differential basis and must have a reasonable relationship to the intent of the legislation. *Giozza v. Tiernan*, 148 U.S. 657 (1893); *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389 (1928); *Flemming v. Nestor*, 363 U.S. 603 (1960). The distinction imposed by the Commissioner's disallowance of net operating deductions in computing the appellant's Carrier Net Income Tax liability is not based upon any justifiable distinction between carriers and other corporate taxpayers.

Indeed, because of the interrelationship with the Corporate Net Income Tax, the appellant is denied the benefit of certain deductions, and therefore taxed at a higher effective rate than those corporate carriers who are not subject to the Carrier Net Income Tax by reason of the limited scope of the targeted class of taxpayers subject to Section 11-12A-3. West Virginia Code § 11-12A-3 imposes a tax on certain carriers and defines those subject to the tax by specific designation. The statute speaks in terms of a tax on certain carriers and does not contemplate that all carriers, as a class, will be subject to the tax. Therefore, the distinction created by the disallowance of the appellant's net operating loss deductions under West Virginia Code

§ 11-12A-3 does not operate with equal force on all members of a designated class and is in violation of the appellant's equal protection guarantees under the Fourteenth Amendment. The discrimination against the appellant by operation of the two statutes is not based upon a legitimate legislative distinction and, although the West Virginia Supreme Court of Appeals summarily rejected the appellant's claim of discrimination, the result cannot be tolerated under the decisions of this Court such as *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973) and *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972).

IV

> Does the gross income tax levied on the appellant's interstate activity in West Virginia by virtue of West Virginia Code § 11-12A-2 impose an unconstitutional burden on interstate commerce by violating the Commerce Clause protections against multiple taxation?

In addition to the tax liability of the appellant under the Carrier Net Income Tax provisions of West Virginia Code § 11-12A-3, the State Tax Commissioner's assessment in this case included tax on the appellant's gross income from interstate activities in West Virginia by authority of West Virginia Code § 11-12A-2, which is set forth in the Appendix hereto. In reviewing the validity of the assessment, the West Virginia Supreme Court of Appeals held that "there is no chance that the State's imposition of this tax will lead to multiple taxation by another state of the same revenue source and thereby impose an unconstitutional burden on interstate commerce." 282 S.E.2d at 248. This conclusion is incorrect for several reasons.

In the first place, Section 11503(b) of Title 49 of the United States Code, as set forth in the Appendix hereto, specifically states that any taxes which discriminate against a rail carrier subject to Interstate Commerce Commission jurisdiction "unreasonably burden and discriminate against interstate commerce." The tax in question here clearly has such an effect, as will be shown below. Secondly, the operative effect of the decision in this case is to impose a tax on gross carrier income from business taking place entirely within West Virginia even though it is clearly derived from activities in interstate commerce. Under this approach, 100% of the appellant's gross income from activities in interstate commerce which took place solely within West Virginia during the assessment period will be taxed under West Virginia Code § 11-12A-2.

However, during the assessment period, the appellant was also subject to a separate franchise tax in Maryland based on an apportionment of gross income in proportion to the ratio that trackage in that state bears to total system trackage. Maryland Ann. Code Art. 81, Sec. 129 *et seq.* During the period in question the appellant had approximately 40% of its miles of road in West Virginia and the remaining 60% out of state. Also, a large portion (about 40%) of the total miles of road were in Maryland. Therefore, a large portion (about 40%) of the same gross interstate income of appellant subject 100% to the West Virginia tax under West Virginia Code § 11-12A-2 as a result of the decision of the West Virginia Supreme Court of Appeals was taxed by Maryland on an apportioned basis during the assessment period. Consequently, the decision of the West Virginia Court in this case does result in multiple taxation of the same revenue and thereby imposes an unconstitutional burden on interstate commerce. *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434 (1939); *J. D. Adams Mfg. Co. v. Storen*, 304 U.S. 307 (1938).

This Court's decision in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), cited extensively by the West Virginia Supreme Court of Appeals in its decision of this case, enunciated the limitations on the power of the several states to tax interstate commerce. As noted in *Maryland v. Louisiana*, 101 S. Ct. 2114 (1981), a state tax on interstate commerce will not be sustained unless it "(1) has a substantial nexus with the State; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and, (4) is fairly related to the services provided by the State." 101 S. Ct. at 2133. There is no question in this case as to the requisite nexus to tax but the nature of the tax, a gross income tax, does raise a question of proper apportionment.

One of the principles evolving from the fair apportionment requirement under *Complete Auto* is that a tax must be tailored so that it attaches primarily to revenue derived from in-state activities. The West Virginia Supreme Court of Appeals recognized this in its decision of this case below. *See: Western Maryland Ry. Co. v. Goodwin*, 282 S.E.2d at 244. The apportionment requirement of *Complete Auto* is closely related to the requirement that the tax be fairly related to the services provided by the state. As was said by this Court in the recent decision of *Commonwealth Edison Co. v. Montana*, 101 S. Ct. 2946 (1981), once the nexus to tax is established, *Complete Auto* "imposes the additional limitation that the *measure* of the tax must be reasonably related to the extent of the contact, . . . the activities or presence of the taxpayer in the State. " 101 S. Ct. at 2958. Thus, the measure of the tax must be consistent with the requirement that only in-state activities are the subject of the tax.

The apportionment requirement has been sustained in a number of instances when applied to factored net income taxes. *Moorman Manufacturing Co. v. Bair*, 437 U.S. 267 (1978). However, a tax levied on gross income must be subject to closer scrutiny. As was noted by this Court in *United States Glue Co. v. Oak Creek*, 247 U.S. 321 (1918), a tax on gross receipts is inherently suspect in that the tax affects each transaction in proportion to its magnitude and irrespective of its profitability. The appellee in this case contended, and the West Virginia Supreme Court of Appeals concurred, that the tax imposed on the activities of the appellant by West Virginia Code § 11-12A-2 was properly apportioned since only those income-producing activities conducted within West Virginia were utilized in computing the tax. However, the West Virginia Supreme Court of Appeals failed to acknowledge the duplicative impact of measuring the tax by gross income from West Virginia activities, especially when this income was also included in the Maryland formula for computing the appellant's Maryland franchise fee. The susceptibility of the apportionment analysis utilized by the West Virginia Court was recognized in *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959), when it was stated that "logically it is impossible, when the tax is fairly apportioned, to have the same income taxed twice. In practical operation, however, apportionment formulas being what they are, the possibility of the contrary is not foreclosed, especially by levies in domiciliary States." *Id.* at 462-63.

The result alluded to in *Northwestern States Portland Cement* exists in this case. The gross income of the appellant which was taxed by West Virginia under West Virginia Code § 11-12A-2 was also taxed by Maryland under Maryland Ann. Code Art. 81, Sec. 129 *et seq.* Thus, the West Virginia Supreme Court of Appeals erred when it held that the tax imposed on the appellant by virtue of West Virginia Code § 11-12A-2 did not subject the appellant to the burden of multiple taxation of revenues arising from interstate commerce in contravention of Commerce Clause protections.

Conclusion

For the foregoing reasons, and in view of the substantial federal questions presented by this appeal, this appeal should be accorded the plenary review of this Court.

Respectfully submitted,

Noel P. Copen
Counsel for Appellant
Huddleston, Bolen, Beatty,
Porter & Copen
P. O. Box 2185
Huntington, West Virginia 25722
(304) 529-6181

Appendix

OPINION OF THE WEST VIRGINIA SUPREME COURT OF APPEALS ENTERED ON JULY 17, 1981

CONSOLIDATED CASES

NO. 14636

WESTERN MARYLAND RAILWAY CO.

V.

THOMAS R. GOODWIN, TAX COMMR., ETC.

NO. 14473

W. VA. MOTOR DELIVERY CO., INC.

V.

THOMAS R. GOODWIN, TAX COMMR., INC.

AND

NO. 14870

UNION BARGE LINE CORP.

V.

DAVID C. HARDESTY, JR., TAX COMMR., ETC.

Kanawha County Reversed and remanded.

Neely, Justice

1. A state tax on interstate commerce will not be sustained unless it: "(1) has a substantial nexus with the State; (2) is fairly apportioned; (3) does not discriminate; and (4) is fairly related to the services provided by the State." *Maryland v. Louisiana, ____ U.S. ____ , ____(1981).*

2. *W. Va. Code,* 11-12A-2 [1967, 1971] taxes the income of carriers derived from business which begins and ends in West Virginia, regardless of whether the business may also be

related to interstate commerce in a tangential way.

3. It is not improper to rely on post-1976 precedent to assess taxes for 1967-73.

4. Income earned by a railroad for switching operations and from demurrage tariffs, when both of these activities take place entirely within West Virginia, is properly taxed under *W. Va. Code,* 11-12A-2 [1967, 1971].

5. The discretion given the State Tax Commissioner by *W. Va. Code,* 11-12A-6 [1967] to consider federal net income figures for tax purposes does not give the commissioner the right to confer the substantive benefit of allowing carriers to carry losses forwards and backwards from one year to others. However, when the commissioner requests federal tax figures from taxpayers and then assesses their taxes on some other basis not otherwise indicated to the taxpayers, he may not assess a penalty in addition to the revised assessment.

6. Income derived by a trucking company for deliveries made between its West Virginia warehouse and points within West Virginia is taxable under *W. Va. Code,* 11-12A-2 [1967, 1971].

7. A ruling by the tax commissioner, not appealed within thirty days, is final only with regard to the particular tax, taxpayer, and years covered by the ruling under *W. Va. Code,* 11-12A-8(c) [1962].

8. A foreign barge company which tows barges to and from West Virginia, as well as through it and between points within it, may be taxed under *W. Va. Code,* 11-12A-3 [1967]. To the extent that this is inconsistent with *American Barge Line Co. v. Koontz,* 136 W. Va. 747, 68 S.E.2d 56 (1951), that decision is overruled.

Neely, Justice:

These three tax cases involve the well cultivated field of the constitutional and statutory limitations on the power of the State to tax interstate commerce. The cases were briefed and argued separately before us, but we consolidated them to treat in one opinion the common issues raised. Of course, ultimately the determination of each turns on its facts, so to that extent they will be considered separately.

The cases involve the application of the State's Tax on the Income of Certain Carriers, *W. Va. Code,* 11-12A-1, *et. seq.,* [1967, 1971], particularly sections 2 and 3. *Code,* 11-12A-2 [1967, 1971] taxes a host of carriers of people and/or property for their business "beginning and ending" in this State.[1] The tax is levied on the gross income generated by such business. *Code,* 11-12A-3 [1967, 1971] taxes the same carriers, in addition to the tax in section 2, (giving a credit for the taxes paid under section 2) for the portion of their interstate transportation business which takes place in this State.[2] This tax on interstate business is levied on a carrier's net income by multiplying that income by a fraction, the numerator of which is West Virginia cargo miles and the denominator of which is total cargo miles in the carrier's system.

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[1] *W. Va. Code,* 11-12-2 [1971], substantially the same as *Code,* 11-12A-2 [1967], provides:

Every motor vehicle carrier operating on the public highways of this State and every railroad car carrier, railroad carrier, express company, pipeline company, telephone and telegraph company, airline company and any person operating a steamboat or other watercraft, for the transportation of passengers or freight, doing business in the State shall pay to the State an annual tax for each calendar year. This tax shall be equal to the gross income from all business beginning and ending within the State multiplied by the respective rates as follows: Motor vehicle carriers, railroad car carrier, railroad carrier, express companies, pipeline companies, airline companies, any person operating a steamboat or other watercraft and telegraph companies, three and three-tenths percent, and telephone companies, three and seventy-four one hundredths percent: Provided, that any motor vehicle carrier which is an urban or suburban bus line shall be taxed at the rate of one and sixty-five one hundredths percent of such gross income and any motor vehicle carrier which is a taxi or cab company or a company which hauls waste, refuse or garbage shall be taxed at the rate of two and five-tenths percent of such gross income.

None of the taxpayers in these cases challenges the State's power to tax interstate commerce in the abstract, but they do challenge the legitimacy of one or the other of these taxes as applied to particular aspects of their activities, either on statutory or constitutional grounds.

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[2] The relevant portions of *Code*, 11-12A-3 [1971], essentially the same as *Code*, 11-12A-3 [1967], are:

In addition to the tax imposed in the preceding section [§ 11-12A-2], every motor vehicle carrier operating on the public highways of the State and every railroad carrier, railroad car carrier, express company, pipeline company, telephone and telegraph company, airline company and any person operating a steamboat or other watercraft for the transportation of passengers or freight, doing business in this State shall pay an annual tax for each calendar year on the net income earned within the State equal to three and seventy-four one hundredths percent of such net income for all other carriers included in this section: Provided, that any motor vehicle carrier which is an urban or suburban bus line or a taxi or cab company or a company which hauls waste, refuse or garbage, five percent of such net income. Net income shall be determined as follows:

(a) The net income of motor vehicle carriers earned within the State shall be determined by ascertaining a sum bearing the proportion to the total net income of the motor vehicle carrier that its business done in West Virginia measured in motor vehicle miles of motor vehicle carrier operation, bears to all business done, measured in like fashion;

(b) The net income of railroad carriers earned within the State shall be determined by ascertaining a sum bearing the proportion to total net income of the carriers that its business done in West Virginia, measured in ton-miles, bears to all business done, measured in like fashion;

•••

(e) The net income of airline companies and any person operating a steamboat or other watercraft for the transportation of passengers or freight earned within the State shall be determined by ascertaining a sum bearing the proportion to the total net income of the corporation that its business done in West Virginia, measured in passenger-miles in the case of airline companies and ton-miles in the case of any person operating a steamboat or other watercraft, bears to all business done, measured in like fashion;

•••

(g) In computing the tax imposed by this section, the total net income of a taxpayer who shall have been taxed under the preceding section [§ 11-12A-2], shall be reduced by an amount bearing the proportion to such total net income that the gross income of the taxpayer which is the measure of the tax under the preceding section bears to its total gross income from all business done wherever conducted.

The State's taxing powers with regard to interstate commerce are limited by the Due Process and Commerce Clauses of the *U.S. Const.*, amend. XIV and Art. 1, sec. 8, cl. 3. Together, these provisions require that the incidence and particular applications of state taxes meet a four-part test. A tax will not be sustained unless the tax: "(1) has a substantial nexus with the State; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and, (4) is fairly related to the services provided by the State." *Maryland v. Louisiana,* ____U.S. ____, (1981). This test is referred to in *Maryland* as the *Complete Auto* test, after the ruling in *Complete Auto, Inc. v. Brady,* 430 U.S. 274, (1977), and it will be referred to as such in the course of this opinion. Subsequent Supreme Court rulings allow us to expand briefly on the contemporary requirements of the *Complete Auto* test.

1. Nexus

The U.S. Supreme Court as often as not has spoken about what is *not* sufficient in a particular case to meet the nexus requirement. The determination of the issue is fact-bound. However, some observations can be made generally. It seems that the nexus criterion inevitably runs into the fourth criterion, the relation to services provided by the State. *See Commonwealth Edison Co. v. Montana,* ___U.S. ___(1981). In *National Geographic Soc'y. v. California Bd. of Equalization,* 430 U.S. 551, 557, (1977), the Court stated that: "It is particularly significant . . . that the Court [in *Standard Pressed Steel Co. v. Washington Rev. Dep't,* 419 U.S. 560 (1975)] characterized as 'frivolous' the argument that the seller's in-state activities were so thin and inconsequential that the tax had no reasonable relation to the protection and benefits conferred by the taxing State." It is clear that, when a direct relationship can be demonstrated between the tax and the cost to the State of the benefits and protections it affords, there is a sufficient nexus for taxation, *see id.* at 558, but the opposite is not true, i.e., nexus may exist even if the in-state activities are not shown to cost the State as much as the amount of the taxes. Neither is it necessary for there to be a nexus between the particular in-state activities of the taxpayer and the activity sought to be taxed. *Id.* We conclude that purposive, revenue generating activities in the State are sufficient to render a person liable for taxes, *See International Shoe Co. v. Washington,* 326 U.S. (1945).

2. Fair Appointment

This requires little explanation. A tax on a person involved in both wholly intrastate commerce and interstate commerce with in-state aspects, must be tailored so as to attach primarily to revenue derived from in-state activities. In the case of transportation, it is true most of the time that a tax related to cargo or passenger miles traveled in state or to the miles of the line in state will be valid, *see Norfolk & W. Ry. v. North Carolina,* 297 U.S. 682, 684 (1936); *Ott v. Mississippi Valley Barge Line Co.,* 336 U.S. 169 (1949).

3. Discrimination

Essentially this criterion requires equal treatment of interstate and local commerce, *see Maryland v. Louisiana,* ___U.S. __ , ___(1981). No state may " 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business,' " *id.,* quoting *Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 458 (1959). See, too, Boston Stock Exchange v. State Tax Comm'n,* 429 U.S. 318 (1977).

4. Relation to Services

The very recent decision in *Commonwealth Edison Co. v. Montana,* ___U.S. ___(1981) is rather instructive on this issue. *Commonwealth Edison* makes it clear that there need not be any direct correlation between the value of benefits afforded the taxpayer by the State and the cost of the tax to the taxpayer. Once the nexus requirement has been met, the fourth criterion "imposes the additional limitation that the *measure* of the tax must be reasonably related to the extent of the contact, . . the activities or presence of the taxpayer in the State." *Id.* at ___. Therefore, "when the measure of a tax is reasonably related to the taxpayer's activities or presence in the State . . . the taxpayer will realize, in proper proportion to the taxes it pays, '[t]he only benefit to which it is constitutionally entitled . . . [:] that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes.' *Carmichael v. Southern Coal & Coke Co.*, 301 U.S., at 522," *id.* at ___.

The actual holding in *Complete Auto, supra,* was simply that a privilege tax on interstate commerce is not *per se* unconstitutional. However, the case was heralded at the time as a clarification of the previously murky waters which were the bane of any court's trying to interpret the law of taxation of interstate commerce, *see, e.g., Chesapeake and Potomac Co. v. State Tax Dep't,* ___W. Va. ___, 239 S.E.2d 918 (1977). Time and subsequent Supreme Court opinions have proven that that expectation was not unfounded, for *Complete Auto* was the touchstone for all subsequent opinions. However, it is necessary to sample briefly some of the U.S. Supreme Court's earlier rulings to see the constraints which were deemed to bind our rulings before *Complete Auto.*

In a case which originated in this State, the Supreme Court held unconstitutional a State tax that in effect directly taxed purely interstate commerce, for such a tax would have been a burden on interstate commerce, *Eureka Pipe Line Co. v. Hallanan,* 257 U.S. 265 (1921). Such a prohibition on burdensome direct taxation of gross income from interstate commerce was reaffirmed in, among others, *Freeman v. Hewitt,* 329 U.S. 249 (1946), but that decision also admitted that the states could measure a variety of taxes against the net income of persons doing business or owning property in the State, including income from interstate commerce. However, in *Spector Motor Service v. O'Connor,* 340 U.S. 602 (1951), the Court ruled that any state tax on the privilege of conducting interstate commerce in a state was *per se* unconstitutional. That this was a matter only of semantics and legislative craftsmanship became embarrassingly apparent by the time *Spector* was overruled by *Complete Auto.* Just three years before *Spector* the Court had held that a "franchise or excise" tax levied against the value of the capital assets of a pipeline company involved in interstate transmission was valid, *Memphis Gas Co. v. Stone*, 335 U.S. 80 (1948). In *Railway Express Agency v. Virginia*, 347 U.S. 359 (1954), the Court held that Virginia's "annual license tax" levied against the privilege of doing business in the state and imposed on gross receipts was unconstitutional. But a similar tax on gross receipts enacted to replace the unconstitutional one, and labeled a "franchise tax," was upheld by the Court in *Railway Express Agency v. Virginia*, 358 U.S. 434 (1959). Other examples might be cited, but these should suffice to show the uncertain perimeters of permissible taxation before *Complete Auto, supra, see* 430 U.S. at 279-85.

The relevant decisions of this Court concerning taxation of interstate carriers followed the Supreme Court's decisions. In *American Barge Line Co. v. Koontz*, 136 W. Va. 747, 68 S.E.2d 56 (1951), we held that the predecessor to *Code*, 11-12A-2 [1967], which imposed a "privilege tax" on "business beginning and ending entirely within the State" as well as on an apportioned share of total gross income from all activities, was invalid as to the latter portion in that it was a direct and unreasonable burden on interstate commerce. The State could tax the barge lines for delivering goods between two points within West Virginia but not for delivering goods whose origin or destination were out of state. In *Battle v. Baltimore & Ohio R.R.*, 149 W. Va. 810, 143 S.E.2d 331 (1965), we held that the application of the privilege tax on apportioned gross income of the B. & O. Railroad was invalid as an unconstitutional burden on interstate commerce. (For a recent discussion of *Battle see Chesapeake and Potomac, supra.*)

It is clear that our cases were conforming to Supreme Court decisions in holding that excessive taxation of interstate commerce in some instances is an unconstitutional burden and that a privilege tax on carriers could not extend to income derived from interstate commerce. Appellees direct our attention to these cases because they maintain that the words "business beginning and ending" mean purely intrastate commerce, *see American Barge Line Co. v. Koontz,* 136 W. Va. 747, 68 S.E.2d at 61, 63, 64 (1951); *Battle v. Baltimore & Ohio R.R.,* 149 W. Va. 810, 143 S.E.2d at 337 (1965). But in both *American Barge* and *Battle* this distinction was dictum. Also, the tax they were construing was a "privilege tax" and as we noted earlier, it was thought at the time that a tax on the privilege of engaging in interstate commerce was *per se* unconstitutional. A tax on the income of a company involved in interstate commerce, which is the tax before us, was not then and is not now *per se* unconstitutional. For the purposes of determining the range of the tax in *Code,* 11-12A-2 [1967, 1971], we find it far simpler and far more reasonable to apply the plain meaning of the words "beginning and ending" rather than to make nice distinctions between "intrastate" and "interstate" income. For in taxation, absent ambiguity or uncertainty, we will apply the statute and not construe it, *West Virginia Tractor Co. v Hardesty,* ___W. Va. __ , ___S.E. 2d __(1981); *J. D. Moore, Inc. v. Hardesty,* 147 W. Va. 611, 129 S.E.2d 722, 724 (1963).

The last issue we must address before we turn to the specifics of each case is whether we can rely on post-1976 precedent to assess taxes for tax years 1967-73. At least one appellee argues that this is an unfair, retroactive imposition of new law. Succinctly stated, the argument is that if we had ruled on these cases in the years in which the taxes had become due, we would have ruled differently because *Complete Auto* had not yet been decided. To this there is a succinct answer. We are not convinced that we would have had to rule differently in earlier years. Whether we would have ruled differently is a matter of speculation only. Also, *Complete Auto* explicitly overruled prior case law, yet the taxes there were levied retroactively. Thus we find little problem with holding taxpayers liable for taxes owed between 1967 and 1973.

WESTERN MARYLAND RAILWAY CO.

(McHugh, J., did not participate in the decision of this case.)

Western Maryland Railway, appellee here, is a freight hauling railroad carrier incorporated outside this State and it is qualified to do business in West Virginia. An assessment was made against Western Maryland in 1975 for Carrier Income Taxes for the years 1970-73, and this assessment was affirmed by the Tax Commissioner, less penalty, in 1977. Western Maryland appealed this decision to the Circuit Court of Kanawha County and the Commissioner's assessment was overruled. The State Tax Commissioner appeals that decision to this Court.

Among its other activities, Western Maryland is engaged in switching railcars between connecting line haul tracks and between line haul track and local spurs. It receives separate payments for this switching. It is also payed a separate tariff for undue detention of its cars by customers in loading and unloading, and this tariff is known as demurrage. Western Maryland classified the revenue from switching and demurrage as "intrastate" or "interstate" depending upon the prior and subsequent line haul portion of the cars' movement. If the prior movement originated outside of West Virginia or if the subsequent destination was a point outside of the State, the revenue was labeled "interstate." Only when the origin and destination of the car were both within West Virginia did the railway classify the income generated as "intrastate." The switching and demurrage Western Maryland called interstate is regulated by the Interstate Commerce Commission while the West Virginia Public Service Commission has jurisdiction over the switching and demurrage appellee called intrastate.

During the years covered by the audit the appellee reported its income from what it designated interstate switching and demurrage under *Code,* 11-12A-3 [1967, 1971] for Carrier Income Tax purposes. The tax commissioner determined that all income from switching services performed and detention of cars wholly within West Virginia should be reported and taxed under the provisions of *Code,* 11-12A-2 [1967, 1971], regardless of appellee's characterization as intra- or interstate. A portion of the 1977 assessment against appellee was due to this reclassification.

Western Maryland also computed its net transportation income for 1971 in accordance with federal income tax methods.

This resulted in a net operating loss for that year. Consonant with federal tax practices, it then carried portions of that loss back to 1970 and forward to 1972 and 1973, the result being that Western Maryland showed no West Virginia net income for any of those years. After the audit, the tax commissioner determined that these loss carry-backs and carry-forwards are inappropriate in computing West Virginia net carrier income and he reassessed appellee's tax after disallowing the loss distributions.

A.

The tax commissioner contends here that the activity of switching cars and the activity of detaining cars both begin and end wholly within West Virginia and so should be taxed under *Code,* 11-12A-2 [1967, 1971]. Western Maryland counters by saying that these activities are inextricably connected with and a necessary incident of interstate commerce, and so are taxable only under *Code,* 11-12A-3 [1967, 1971]. In effect their argument is that switching and demurrage are part and parcel of the movement of the cars across state lines, notwithstanding the fact that the physical acts of switching and detention occur within the State.

We find little merit to the argument that demurrage is not taxable under *Code,* 11-12A-2 [1967, 1971]. It can as easily be said that demurrage is incidental to the loading and unloading of cargo in this State as that it is an incident of the interstate transportation of that cargo. There is no question in our minds that payments for undue detention of cars within this State provide revenues from "business beginning and ending" in West Virginia. Therefore, demurrage income from detention of cars within West Virginia, whatever the origin or destination of the cars, is taxable under *Code,* 11-12A-2 [1967, 1971].

Switching is a closer question in that it at times involves switching cars that have come from one state onto lines that will take the cars to another state. In this respect, switching might be seen as a part of the flow from one state through West Virginia on to another state. However, our reading of the record satisfies us that switching is a separate, distinct, time-consuming operation and not incidental to the interstate movement of goods. So long as switching is a distinct and identifiable activity we hold that switching is a business which begins and ends in West Virginia and appellee is liable for taxes on switching revenue under *Code,* 11-12A-2 [1967, 1971].

Having determined that appellee's activities are taxable under the statute we must determine whether such a tax is constitutionally valid. Since the tax is on revenues derived from in-state activities, there is no question that both the nexus and apportionment requirements are met. Furthermore, the tax does not discriminate against interstate commerce: local and interstate commerce must pay the tax alike. Appellee benefits from the State's police and fire protection while engaged in switching cars and appellee is free to use the State's laws and courts to enforce its rights against West Virginia customers and others found in the State. We find, therefore, that the tax is fairly related to the services provided by the State to Western Maryland. Finally, we note that since these activities of appellee take place wholly within West Virginia and they are identified by it as such, there is no chance that the State's imposition of this tax will lead to multiple taxation by another state of the same revenue source and thereby impose an unconstitutional burden on interstate commerce.

Appellee makes a separate constitutional argument that is based on the 1980 amendment to *Code,* 11-12A-2. The amendment exempts motor vehicle carriers from the tax under 11-12A-2 when the activity is "part of an uninterrupted continuation of interstate transportation . . . [and] without a container change or warehousing." Appellee argues first that this amendment evidences a legislative determination that our understanding of the pre-1980 statute is incorrect. Second, it argues that such exemption for motor vehicle carriers only, and not rail, water and other carriers, violates the Equal Protection Clause, *U.S. Const.,* amend. XIV, the "equal and uniform" taxation clause, *W. Va. Const.,* Art. X, Sec. 1, and 49 U.S.C. 11503(b) (1979 sup.) which prohibits taxes which discriminate against railroads. From this it concludes that we should not apply the statute as we have proposed.

If the 1980 amendment shows anything about prior legislative intent, we will adhere to the rule that an amendment is meant to change the law, *see West Virginia Bd. of Dental Examiners v. Storch,* 146 W. Va. 662, 122 S.E.2d 295, 300 (1961); *Kisner v. Fiori,* 151 W. Va. 850, 157 S.E.2d 238, 242 (1967). Therefore, we find that the amendment bears out our understanding that, absent legislated exemptions, *Code,* 11-12A-2 [1967, 1971] taxes all carrier business beginning and ending in the State. If the 1980 amendments violate the constitutional or statutory provisions above, then we should declare that the amendment, not the law it amends, is void. Even if we were to do that, appellee would still be liable for the tax under section 2. That question is not before us, however, and we need not decide it now. Appellee's taxes are being assessed under the pre-1980 statute and the question of whether the 1980 amendment discriminated in any way is not involved at all.

B.

The entire West Virginia tax code is hardly drafted with the precision of the federal *Internal Revenue Code of 1954.* Consequently, there are occasional inartful uses of language which cause trouble for the Commissioner, the taxpayer, and the courts. Such is the reference to the use of federal income tax computations at issue in this case. Certainly it is convenient for a taxpayer to be able to use its federal computations for State purposes; such a simplification is highly laudable. However, in the case before us, the real issue is one of substantive law and not mere accounting: Is there authority in *Code,* 11-12A-3 [1971] for losses in one year to be carried either forward or backward? We find no authority to this effect, and tax-loss-carry-forward is a crucial, substantive, issue in tax law. There is no problem using the federal figures; it is only the effect of the forms which is at issue. Our statute imposes a yearly tax on each year's income; the statute gives no credit for prior or future losses. This is in sharp contrast to the explicit authority in I.R.C. § 172 (1976). If the Legislature had intended such a credit they would have given it directly, and it is unreasonable to infer from the general authority allowed in *Code,* 11-12A-6 [1967] to use federal forms for accounting purposes that a substantive benefit of considerable magnitude was intended to be conferred in direct controvention of the plain words of *Code,* 11-12A-3 [1967].

The discretion granted the commissioner by *Code,* 11-12A-6 [1967] to consider federal net income is for his and taxpayers' convenience. His exercise of that discretion by asking taxpayers for their federal net income confers the benefits of convenience, not the benefits of a tax credit. However, we hold that when the commissioner asks for federal income figures and then assesses the tax at a higher level based on other figures not requested, or at a rate not otherwise indicated, he may not assess a penalty in addition to the revised assessment. Hence the commissioner was correct in waiving the penalty in this case, especially with respect to the additional assessment based on his disallowing the loss distributions.

C.

We conclude, therefore, that the decision of the Circuit Court of Kanawha County should be reversed and the case should be remanded for further proceedings consistent with this opinion.

WEST VIRGINIA MOTOR DELIVERY CO., INC.

The State Tax Commissioner in 1977 affirmed an additional assessment against West Virginia Motor Delivery under *Code,* 11-12A-2 [1967, 1971], less penalty, as assessed by his office in 1975 for tax years 1970-73. West Virginia Motor Delivery, appellee here, appealed that decision to the Circuit Court of Kanawha County. That court ruled that appellee would be liable for the tax in question under current doctrine, but the court refused to apply its decision retroactively. The State Tax Commissioner appeals from that ruling and we reverse.

West Virginia Motor Delivery is engaged in the business of delivering meat by refrigerated truck. In the years in question, it received shipments of meat at its warehouse near Dunbar, West Virginia, from meat packers, all of whom were located out-of-state. In general, the meat was transferred directly from the shippers' trucks to appellee's trucks, but at times appellee stored the meat in its warehouse overnight. Appellee then delivered the meat to retailers both inside and outside West Virginia. It has been estimated that approximately 88% of appellee's income came from deliveries made to places in West Virginia and 12% from deliveries out-of-state.

Appellee believed that its operations were part of the continuous interstate shipment of goods and so it paid taxes under *Code,* 11-12A-3 [1967, 1971] only. In part appellee's conclusion in this regard was based on a decision of the State Tax Commissioner in 1964 that appelle was not liable for taxes on such deliveries under *Code,* 11-12A-4 [1962], predecessor to *Code,* 11-12A-2 [1967]. The Tax Commissioner now argues that part of appellee's business involves the delivery of goods wholly within state, and that appellee is therefore liable for tax on income from in-state deliveries under *Code,* 11-12A-2 [1967, 1971] as well as under *Code,* 11-12A-3 [1967, 1971]. As noted above, the circuit court agreed that, under *Complete Auto,* appellee could be so assessed, but the court determined that such assessment amounted to retroactive imposition of the tax and the court refused to impose such tax retroactively.

A.

We certainly agree with the circuit court's findings of fact with regard to appellee's in-state deliveries. Appellee's business is a continuation of the transportation of goods from other states to points in West Virginia, but with regard to deliveries it makes in-state, the only ones in question here, *its* business begins and ends in West Virginia. It is true that the shipments consigned to appellee are prepackaged and pre-billed by the out-of-state shipper and that appellee is paid by the out-of-state shipper and not by the ultimate consignee. It is true that the meat packers are engaged in interstate commerce and appellee may also be engaged in interstate commerce. But *Code,* 11-12A-2 [1967, 1971] does not distinguish between interstate and intrastate commerce. Appellee's business consists of taking meat from one place in West Virginia and delivering it to another place in West Virginia and such a business is clearly taxable under *Code,* 11-12A-2 [1967, 1971] as business "beginning and ending" in West Virginia.

We disagree with the circuit court's conclusion that taxing appellee on this business amounts to retroactive application of new law for the reasons outlined in the introduction to these cases. We only add that retroactivity is not an issue here because we are not overruling any prior decisions

B

However, we do find it necessary to take up the question raised by appellee that the State is estopped from making this assessment by virtue of the 1964 decision of the Tax Commissioner. The record discloses that the Assistant Tax Commissioner adjusted an assessment made against appellee for 1958-62 "under the provisions of Chaper 11, Article 12A of the Code of West Virginia." In testimony, appellee's president stated that this adjustment held appellee liable for taxes under *Code,* 11-12A-4 [1962] only for deliveries made for West Virginia meat packers to West Virginia customers, but not for deliveries made for out-of-state packers to West Virginia customers. We will assume *arguendo* that this is so.

The question is what effect does such a ruling by the Tax Commissioner have on an attempt to assess the same taxpayer under a different statute (albeit a "substantial re-enactment" of the previous one, *see Chesapeake and Potomac Co. v. State Tax Dep't.* ___W. Va. ___, 239 S.E.2d 918, 925 (1977) and for different years. The Tax Commissioner was empowered at the time of the previous assessment to conduct hearings on petitions by taxpayers for reassessment and to issue rulings based on the hearings. It was further provided that "unless an appeal is taken within thirty days from service of this notice [of the ruling], the tax commissioner's decision shall be final," *Code,* 11-12A-8(c) [1962]. The current assessment is governed by substantially the same language in *Code,* 11-12A-12 [1967], and assessments since 1978 are governed by *Code,* 11-10-10 [1978].

In *Cunningham v. County Court of Wood County*, 148 W. Va. 303, 134 S.E.2d 725, 729 (1964), we stated that the "general rule is that an estoppel may not be invoked against a governmental unit when functioning in its governmental capacity." Both parties agree that tax collection is a governmental, as opposed to proprietary, function. To the extent that *Code*, 11-12A-8(c) [1962] is in derogation of the common law rule enunciated in *Cunningham, supra*, it binds the State with respect to assessments for particular taxpayers, particular years, and particular taxes. Thus the Tax Commissioner could not attempt to assess West Virginia Motor Delivery for taxes under *Code*, 11-12A-4 [1962] after thirty days had passed from his decision on the matter for the years 1958-62. However, the 1964 ruling is in no way binding with respect to assessments under *Code*, 11-12A-2 [1967, 1971] for the years 1970-73.

If appellee had wanted a definitive ruling from the Tax Commissioner about its prospective liability under *Code*, 11-12A-2 [1967], it could have done so under the provisions of *Code*, 29A-4-1 *et seq.* [1964]. Those sections set out the declaratory judgment procedures to be used by citizens dealing with State agencies, including the Tax Department, concerning "the applicability to any person, property or set of facts of any rule or statute enforceable by it," *Code*, 29A-4-1 [1964]. Such declaratory judgments may be binding. The *Code*, also provides for the hearings and fact-finding procedures necessary to prevent arbitrary, careless, or groundless judgments. *Id.* Finally, these judgments may be subjected to judicial review, *Code*, 29A-4-2 [1964].

C.

We can now briefly address the constitutionality of this tax as applied to this taxpayer. West Virginia Motor Delivery is a West Virginia Corporation. It does business in this State with consignees primarily in this State. There is no question that there is a substantial nexus with the State. The tax in question taxes income derived only from appellee's activities in State, so it is fairly apportioned. Local and interstate commerce must pay the same tax for the same activities, so the tax is not discriminatory. Finally, being a West Virginia corporation located within the State, there is no question that the tax is fairly related to the services provided by the State to appellee. The State provides roads and police protection which are of direct benefit to appellee, and the State provides schools which undoubtedly are used by appellee's employees' children. We conclude that the assessment made by the Tax Commissioner, less penalty, was proper under the statute and under the constitution.

Therefore, the decision of the Circuit Court of Kanawha County is reversed and the case is remanded for proceedings consistent with this opinion.

UNION BARGE LINE CORPORATION

This case presents the question of whether there is sufficient nexus to support a tax on appellee Union Barge Line Corporation and whether the tax is fairly related to the services provided appellee by the State. We find that both questions should be answered in the affirmative and, therefore, we uphold the assessment, but we remand the case for the determination of certain factual questions concerning the amount of cargo ton miles carried in this State.

In 1972 the State Tax Department assessed Union Barge under *Code,* 11-12A-3 [1967] for net income derived during 1967-70 from Union Barge's so-called one-point and pass-through traffic. One-point traffic involves either carrying goods to a point in this State from another state or carrying goods from West Virginia to another state. Pass-through traffic involves carrying goods from one state to another across West Virginia without stops. In 1977 the Tax Commissioner affirmed a modified version of the assessment, less penalty. Union Barge made a timely appeal to the Circuit Court of Kanawha Court in which the assessment was overruled. The Tax Commissioner appeals to this Court from that ruling.

Union Barge Line Corporation is a Pennsylvania corporation not qualified to do business in the State of West Virginia. It is headquartered in Pittsburg and is engaged in transporting freight in barges along the navigable waters of the United

States. A substantial portion of its business travels the Ohio River and a small amount travels along the Kanawha River. The bed of the Kanawha River belongs to West Virginia as does the bed of the Ohio River up to the low water mark on the Ohio side. The United States controls the waters of both rivers. The Company tows some barges between two points within West Virginia but such traffic comprises only one fifteen-hundredth (1/1500) of all its traffic everywhere, according to 1977 figures. Union Barge did pay taxes on this traffic during the audit years but it payed no tax on the far more substantial one-point and pass-through traffic which occurred in West Virginia.

Union Barge does not maintain an office or place of business in West Virginia and it does not have any agents or employees in the State. The circuit court found that appellee does not use any docks, properties, facilities, or services of the State of West Virginia or any of its subdivisions. The United States government is responsible for the regulation and servicing of navigable waterways, of which the Ohio and Kanawha Rivers are a part. Accordingly, the court determined that there was insufficient nexus between Union Barge and the State to support imposition of any tax. In this regard, it found controlling *American Barge Line Co. v. Koontz,* 136 W. Va. 747, 68 S.E.2d 56 (1951). There this Court held in a factually similar situation that the imposition of a privilege tax on apportioned gross income of a barge company was an undue burden on interstate commerce. We also stated that "there is certainly no taxable incident in connection with through traffic of the plaintiffs occurring within the State of West Virginia which would afford a basis for the tax," *id.* at 63.

We disagree with the circuit court's ruling and therefore reverse. To the extent that *American Barge* invalidated the application of a different tax, it is not binding in the case at bar. To the extent that it is inconsistent with the findings *infra* concerning nexus, it is overruled. We find that there is sufficient nexus between Union Barge and this State to support the imposition of a tax on it and that the tax in question is fairly apportioned, non-discriminatory, and fairly related to the services provided appellee by the State.

A.

Appellee is engaged in business which begins and ends within West Virginia for which it payed taxes under *Code,* 11-12A-2 [1967]. Inasmuch as the question is whether there is a substantial nexus between a taxpayer and the State to support the imposition of *any* tax, the fact that appellee does not contest the validity of taxing its wholly in-state business is at least persuasive that some nexus exists with regard to some operations. That, however, is not dispositive since arguably appellee could have identifiable, separate, business operations which are so far removed from this State as to make them immune to our taxation.

However, the activities in question do involve a West Virginia "nexus" since our view of the record suggests that appellee has far more substantial contacts with this State than were found by the circuit court. Appellee's vice-president testified that its wholly in-state business was primarily done to accommodate its interstate customers or to accommodate other carriers. This suggests that its in-state business, while small, was helpful in the maintenance of other one-point and pass-through business. Approximately four percent of appellee's total cargo ton miles passed through West Virginia on one-point business. Approximately six percent of appellee's total cargo ton miles travel through West Virginia as pass-through traffic. This suggests substantial activity conducted within the State.

Appellee owns almost all of the barges it tows. When appellee's barges are dropped off for loading and unloading in this State, they are docked for days at a time at docks owned by companies doing business in this State. It should not matter, contrary to the circuit court's suggestion, that the docks are owned by private corporations and not by the State of West Virginia. Appellee charges its customers a demurrage tariff for undue delay in loading and unloading of the barges. This is income earned exclusively in this State as the result of one-point business in West Virginia.

Appellee at times buys food and fuel for its tugboats and crews from West Virginia businesses along the rivers, although this is an infrequent occurrence. It also sometimes uses West

Virginia as drop-off and pick-up points for its employees, some of whom live in West Virginia. Should any of the barges or tugs break down or become damaged in West Virginia, appellee will at times have them repaired in this State or send its own crews here to inspect and/or repair the equipment.

B.

Given this factual basis, there are numerous Supreme Court cases which support the conclusion that there is a substantial nexus between taxpayer and the State in this case to support taxation. *Ott v. Mississippi Valley Barge Line Co.,* 336 U.S. 169 (1940) involved the imposition of an *ad valorem* tax on barge companies based on the number of miles of their lines in Louisiana, the state of taxation, compared with the number of miles in the lines overall. The Court noted at 170-71 that:

> In the trips to Louisiana a tugboat brings a line of barges to New Orleans where the barges are left for unloading and reloading. Then the tugboat picks up loaded barges for return trips to ports outside that State . . . [The] turn-arounds are accomplished as quickly as possible with the result that the vessels are within Louisiana for such comparatively short periods of time as are required to discharge and take on cargo and to make necessary and temporary repairs.

This is almost identical to the description we have of appellee's one-point operations in West Virginia. There the Supreme Court held that there was sufficient nexus for the imposition of the *ad valorem* tax.

Undoubtedly appellee will protest that in *Ott, supra,* the taxpayers each had an office or agent in Louisiana while appellee has neither office nor agent in West Virginia. We find such protest without merit. The existence of an agent or office in Louisiana was given no emphasis in the Court's determination of that case. The controlling factor was that the appellees were engaged in business in the state and they had property there that could be taxed. Towing barges which were docked in Louisiana provided the nexus; with that established, "the only question is whether the tax in practical operation has relation to opportunities, benefits, or protection conferred or afforded by the taxing State. [Citation omitted.] Those requirements are satisfied if the tax is fairly apportioned to the commerce carried on within the State." *Id.* at 174.

We conclude on the basis of *Ott* and the factual analysis presented above that the assessment here meets three criteria of *Complete Auto:* appellee's one-point business alone is sufficient to provide the substantial nexus necessary for taxation by the State;[3] the tax in *Code,* 11-12A-3 [1967] is fairly apportioned in that it is assessed on the portion of net income which is derived from in-state activities; and, it does not discriminate against interstate commerce by making it pay higher taxes than local commerce.

C.

The appellee asserts that the Tax Commissioner has not demonstrated that appellee derives any benefits from the State and, therefore, the tax fails on the fourth criterion -- its relation to benefits received. However, the burden is on the taxpayer to show that the inferences of benefits received through its in-state activities are unfounded. "In this type of case the taxpayers must show that the formula places a burden upon interstate commerce in a constitutional sense," *Northwestern States Portland Cement Co. v. Minnesota,* 358 U.S. 450, 463 (1959). Appellee's barges are docked at piers in West Virginia for substantial periods throughout the year and there is every reason to believe that they are provided with police and fire protection by the State. Appellee's vice-president testified that if a crewman becomes ill while traveling through West Virginia he may be taken to a West Virginia hospital, and most hospitals receive some State aid.

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[3] *See, too, Standard Oil Co. v. Peck,* 342 U.S. 382, 382-83 (1952) *(Ott* "placed inland water transportation on the same constitutional footing as other interstate enterprises"); *Braniff Airways, Inc. v. Nebraska Bd. of Equalization,* 347 U.S. 590, (1954) (upholding *ad valorem* tax on aircraft; issue "devolves into the question of whether eighteen stops per day by appellant's aircraft is sufficient contact with Nebraska to sustain that state's power to levy an apportioned *ad valorem* tax on such aircraft," at 600-01, answered affirmatively); *Alaska v. Arctic Maid,* 366 U.S. 199 (1961) (upholding Alaska licensing tax on freezer ship assessed against value of fish stored; tax valid even though ship never entered Alaska waters because local fishermen sold fish to the ship and the ship sent long-boats into Alaska waters); *Japan Line Ltd. v. County of Los Angeles,* 441 U.S. 434, 442 (1979) ("various instrumentalities of commerce may be taxed, on a properly apportioned basis, by the nondomiciliary States through which they travel") (dictum). It is true that most of these cases deal with property taxes, but we find that irrelevant to the issue of nexus because nexus has to do with the power of the states to levy taxes. As appellee states in its brief, "the form of the tax is irrelevant to the due process questions of nexus and state benefits." These cases establish that West Virginia may constitutionally tax barge companies whose equipment passes through the State so long as the other criteria of the *Complete Auto* test are met.

In section A we outlined a variety of services and opportunities available to and used by appellee that are provided by people in West Virginia. Certainly these things contribute to the viability of appellee's operations overall. This contribution, protected by the State, is something for which the State, in the name of the people of West Virginia, can ask for taxes in return. "A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the State has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society," *Wisconsin v. J.C. Penney Co.,* 311 U.S. 435, 445 (1940).

This case must be remanded to the circuit court for further proceedings, however, because the appellee did raise a substantial factual matter with regard to apportionment which was not resolved by the circuit court. The appellee alleges that the Ohio River has shifted so that for some distance, as appellee's barges pass West Virginia, they actually are traveling across Ohio and not this State. If that, in fact, is the case, then the tax assessment should be reduced accordingly.

For the reasons set out above, the decision of the Circuit Court of Kanawha County is reversed and the case is remanded for further proceedings consistent with this opinion.

GENERAL CONCLUSION RELATING TO ALL CASES

Over the years, in interpreting the Commerce Clause, the U.S. Supreme Court has attempted to preserve unencumbered trade among the states while also allowing the states to make interstate commerce pay its own way. *Complete Auto* has expanded and certainly rationalized the taxing powers of the states. It has also provided the courts with a rational and coherent test for state taxes on interstate commerce. However, the semantic niceties which emanated from the Supreme Court decisions before *Complete Auto* perhaps forced on state legislatures an arbitrary, "tax as tax can" attitude with regard to interstate commerce, thereby producing hodgepodge taxation.

In the four years since *Complete Auto* the arbitrariness has remained. The states perhaps have taken advantage of the expansive aspects of *Complete Auto* more often than is theoretically justified based on the economics of interstate commerce. In some instances the *Complete Auto* test has succeeded in eliminating rapacious new taxes of the sort that the Commerce Clause was designed to prevent, *see, e.g., Maryland v. Louisiana,* ___U.S. ___(1981). Unfortunately, the effect of several new applications of old taxes by different states in combination can be just as rapacious as a single new tax, but this effect can easily go unnoticed. Since each application of an old tax by itself is more likely to satisfy the *Complete Auto* requirements of nexus, fair apportionment, anti-discrimination, and fair relationship, taxpayers must make substantial factual showings if they are to contradict the *prima facie* evidence of constitutionality and prove that the taxes in combination exceed state power or unduly burden interstate commerce. Absent such showings, courts are left no choice but to affirm such taxation.

Hence we realize that the results in the decisions discussed in this opinion as well as in our recent decisions, *Chesapeake and Potomac Co. v. State Tax Dep't.,* __W. Va. ___, 239 S.E. 2d 918 (1977) and *J.C. Penney Co., Inc. v. Hardesty,* __W. Va. ___, 264 S.E. 2d 604 (1979), may give the appearance that we will allow the State to expand its taxing powers in spongelike fashion and with only perfunctory review. But this is not the case. The taxpayer's burden of proof in such cases is substantial, but it is not insurmountable nor one established just yesterday, *see Northwestern States Portland Cement Co. v. Minnesota,* 358 U.S. 450, 463 (1959); *Standard Pressed Steel Co. v. Rev. Dep't. of Washington,* 419 U.S. 560, 563 (1975). In fact, we discussed this same problem less than two years ago in *Richardson, Gordon and Assocs. v. Hardesty,* decided in *J.C. Penney, supra,* ___W. Va.___, 264 S.E.2d 604 (1979). We stated there that for a taxpayer "to avoid a state tax under the Commerce Clause it is necessary to demonstrate sufficient duplication of taxation that there is an actual discrimination against interstate commerce," *id.* at 612. The same burden was enunciated concerning apportionment and relation to services. But there, too, there was no serious effort factually to substantiate the constitutional claims. So *here,* too, we are left exasperated because "there is no development in this record of this particular question other than naked allegations," *id.*

As the U.S. Supreme Court has said, "logically it is impossible, when the tax is fairly apportioned, to have the same income taxed twice. In practical operation, however, apportionment formulas being what they are, the possibility of the contrary is not foreclosed, especially by levies in domiciliary States. But that question is not before us." *Northwestern States Portland Cement Co. v. Minnesota,* 358 U.S. 450, 462-63 (1959). The question was before it, however, in *Norfolk and W. Ry. Co. v. Missouri Tax Comm'n,* 390 U.S. 317 (1968). In that case the Court held that the taxpayer had carried successfully its "heavy burden" by proving that the application of a mileage formula for apportionment had "led to a grossly distorted result," *id.* at 326.

We, too, will be receptive to factual showings by taxpayers involved in interstate commerce that the taxes as applied to them are not properly apportioned, or that they actually receive no benefits from the State, or that the taxes discriminate against interstate commerce. We stand ready to reverse tax assessments when taxpayers successfully support the heavy burden of proof and the State does not disprove taxpayers' evidence that the imposition of certain taxes is unconstitutional in any of those ways. To help minimize the potential for such unfair taxation, we urge the Legislature to re-evaluate its tax policy concerning interstate commerce and take advantage of the rationalizing potential offered by *Complete Auto* and its progeny.

No. 14636 - Reversed and remanded,
No. 14473 - Reversed and remanded,
No. 14870 - Reversed and remanded.

PETITION FOR REHEARING DENIED BY THE WEST VIRGINIA SUPREME COURT OF APPEALS ON OCTOBER 8, 1981

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 8th day of October, 1981, the following order was made and entered, to-wit:

Western Maryland Railway Company, a corporation, Plaintiff Below, Appellee

14636 vs.

Thomas R. Goodwin, Tax Commissioner of the
State of West Virginia, Defendant Below, Appellant

The Court having maturely considered the petition for rehearing and reargument filed in the captioned action is of opinion to, and doth hereby deny the prayer of the petition and doth order that the final order entered herein be made absolute and certified as heretofore directed. Justice McHugh deeming himself disqualified, did not participate in the consideration of this action. Chief Justice Harshbarger absent.

A True Copy

[Signed by George W. Singleton]
Attest: George W. Singleton
Clerk Supreme Court of Appeals

ORDER OF THE CIRCUIT COURT OF KANAWHA COURT ENTERED MARCH 30, 1979

IN THE
CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

WESTERN MARYLAND RAILWAY COMPANY,
a corporation

Plaintiff,

v. CIVIL ACTION NO. AP-CA-77-102

THOMAS R. GOODWIN, Tax
Commissioner of the State
of West Virginia,

Defendant.

ORDER

This case came before the Court upon the petition of Western Maryland Railway Company on appeal to set aside the administrative decision of the Tax Commissioner of the State of West Virginia dated July 5, 1977, as amended by the Commissioner's letter of August 1, 1977, together with the briefs and oral arguments of counsel and all pleadings and matters of record.

Thereupon, the Court having reviewed and fully considered the record in this case and the briefs and oral arguments of counsel submitted herein, is of the opinion to and does make and reach the findings and conclusions and does reverse the administrative decision of the Tax Commissioner of the State of West Virginia dated July 5, 1977, as amended by the Commissioner's letter of August 1, 1977, all as set forth in that certain letter-memorandum opinion prepared by this Court and dated January 3, 1979, a copy of which letter-memorandum opinion is ORDERED to be made a part of and is filed as a part of the record in this case and is attached hereto and made a part of this order, all of which is now accordingly done. It is further ORDERED that the assessment of carrier income tax against Western Maryland Railway Company for the period January 1, 1970 to December 31, 1973 be recomputed by the Tax Commissioner of the State of West Virginia in conformity with this order and the foregoing letter-memorandum opinion which has been made a part hereof.

To all of which defendant, by counsel, does hereby object and except.

Enter: This 30th day of March, 1979.

[Signed]
Thomas E. McHugh
Judge

Appproved for Entry:
[Signed]
Noel P. Copen
Counsel for Plaintiff

[Signed]
Robert Digges, Jr.
Counsel for Defendant

OPINION OF THE CIRCUIT COURT OF KANAWHA COURT

January 3, 1979

Noel P. Copen, Esquire
Huddleston, Bolen, Beatty, Porter & Copen
P. O. Box 2185
Huntington, West Virginia 25722

Thomas J. Steele, Jr., Esquire
Assistant Attorney General
Tax Division
State Capitol
Charleston, West Virginia 25305

Re: Western Maryland Railway Company,
a corporation v.
Thomas R. Goodwin, Tax Commissioner
of the State of West Virginia
Civil Action No. AP-CA-77-102

Gentlemen:

This case is before this Court upon the petition of the taxpayer, Western Maryland Railway Company, upon appeal from the final decision of the West Virginia State Tax Commissioner, dated July 5, 1977, as amended by the Commissioner's letter of August 1, 1977, together with briefs filed by counsel and all pleadings and matters of record.

The Western Maryland Railway Company (hereinafter referred to as taxpayer) is a freight hauling railroad carrier. Its lines extend westward into West Virginia and Pennsylvania from Baltimore, Maryland, where it operates pier facilities.

The present assessment in the amount of $23,784.88 for the years 1970-1973, the period in question, arose as a result of audit findings that the taxpayer had failed during the audit period to report and pay tax due on carrier income derived from switching and demurrage performed in West Virginia.

Switching income consists of the taxpayer's revenue from the switching of railroad cars between connecting lines and between connecting lines and local industries.

The taxpayer had five stations in West Virginia during the audit period (1970-1973) that could have performed switching services in this state. The five stations were Belington, Durbin, Elkins, Hutchinson and the Luke, Maryland, switching district which included West Virginia activity. (T. 49)

During the period in question, there was no switching activity at Belington. However, a unique situation existed at the Luke, Maryland station because this station is adjacent to West Virginia. Switches at Luke, Maryland were actually performed partially in West Virginia and partially in Maryland. All switching traffic through this station either originated in West Virginia and terminated in Maryland, or originated in Maryland and terminated in West Virginia (T. 67, 69).

In its records, the taxpayer segregated the switches performed at its switching facilities in West Virginia according to whether such switches were two point *intrastate* transportation activities in West Virginia or *interstate* transportation activity with one point in West Virginia.

Demurrage during the period 1970-1973 consisted of the taxpayer's revenue from the detention of cars incident to loading and unloading upon the basis of tariffs (1) regulated by the West Virginia Public Service Commission (WVPSC) if the shipment being loaded or unloaded was wholly intrastate in nature, or (2) regulated by the Interstate Commerce Commission (ICC) if the shipment being loaded or unloaded was solely interstate in nature. During the period 1970-1973, the taxpayer had eight reporting stations in West Virginia, some of which had no demurrage revenue at all (T. 85).

The liability of the taxpayer as originally determined by the Tax Commissioner was for carrier income tax for the period January 1, 1970 to December 31, 1973, in the amount of $30,448.80.

The notice of assessment together with the assessment was issued by the Tax Commissioner on December 8, 1975. Subsequently, the taxpayer filed a timely petition for reassessment and a hearing on the petition was held on May 19, 1976.

Following the hearing, an administrative decision of the Tax Commissioner dated July 5, 1977, was mailed on or about July 8, 1977, and received by the taxpayer on July 11, 1977. The Tax Commissioner's decision, as amended by his letter dated

August 1, 1977, modified the assessment of tax to $23,784.88 for the period January 1, 1970 through December 31, 1973, and waived the penalty in whole for reasonable cause pursuant to Section 16, Article 12A, Chapter 11 of the West Virginia Code.

The taxpayer accepted so much of the administrative decision as related to the determination of the correct amount of rent and miscellaneous income derived from its transportation business, the use of West Virginia revenue ton miles in the computation of the annual tax on the taxpayer's net income earned within West Virginia, and the waiver of penalty for reasonable cause. However, pursuant to Section 13, Article 12A, Chapter 11 of the West Virginia Code, the taxpayer filed this appeal to set aside the decision of the Tax Commissioner insofar as such decision includes interstate demurrage and switching revenue in the computation of the annual tax on gross income and also disallows the carry-back to 1970 and carry-forward to 1972 and 1973 of the taxpayer's 1971 net operating loss determined for federal income tax purposes in the computation of the annual tax on net income.

Specifically, the points in controversy between the taxpayer and state are as follows:

1. Whether the West Virginia State Tax Commissioner was correct in including interstate switching and demurrage revenue in computing the annual carrier tax on gross income.

2. Whether the West Virginia State Tax Commissioner was correct in disallowing the carry-back to 1970 and carry-forward to 1972 and 1973 of the taxpayer's 1971 net operating loss determined for federal income tax purposes in computing the annual carrier tax on net income.

1. *The inclusion of interstate switching and demurrage revenue in computing the annual carrier tax on gross income.*

Pursuant to West Virginia Code, 11-12A-2, every railroad carrier doing business in the state shall pay to the state an annual tax for each calendar year. Such tax is to be equal to the gross income from all business beginning and ending within the State, multiplied by a set rate. The statute clearly expresses intent on the part of the legislature to tax business beginning and ending within the state. Tracing the legislative history of this statute, it is noted that the gross income of railroads was never intended by the legislature to be taxed in terms of interstate commerce. Furthermore, it has been held that "beginning and ending within the State" should be construed to mean solely intrastate commerce. *Battle v. B & O R. R.*, 149 W.Va. 810, 143 S.E. 2d 331 (1965). Therefore, the validity of the decision of the Tax Commissioner depends upon whether the switching and demurrage services would properly be classified as having begun and ended within West Virginia.

The Tax Commissioner's argument centers upon the contention that the assessment should be upheld as to the switching and demurrage charges because these activities take place completely within West Virginia. This conclusion was reached by citing the guidelines set forth by the Unites States Supreme Court in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S. Ct. 1076, 51 L. Ed. 2d 326 (1977) and then determining that the present tax assessment upon the income of the taxpayer from switching and demurrage is within these guidelines.

Nothwithstanding this logical analysis, the guidelines to be used in taxing the gross income of railroads have already been set by the West Virginia Legislature, and any extension of these guidelines is properly within the judgment of that branch of government.

What is here involved is the determination of whether switching and demurrage services in West Virginia were intended to be included in determining the tax on gross income pursuant to the guidelines set in West Virginia Code, 11-12A-2, i.e. "beginning and ending within the State."

The Tax Commissioner asserts that a clear reading of Reg. Act. §1.2C.2 and Example 3 of Reg. Act. §1.4 and the rules and regulations of Annual Tax on Income of Certain Carriers leads to the conclusion that switching and demurrage charges that clearly begin and end within the State of West Virginia are taxable under the Carrier Tax on Gross Income. Reg. Act §1.2C.2 states in part that:

> "The gross income of carriers subject to tax is only that gross income derived from intrastate activities. The tax is applied against the gross income derived

> from transportation activities within the State, such activities being business beginning and ending within West Virginia."

In addition, Example 3 of Reg. Act §1.4 states in part that :

> "XY Railroad Co., a railroad carrier, has the following operations in connection with West Virginia:
>
> (5) Income from demurrage in the amount of $9,000 was received and $1,000 was attributable to this State.
>
> (6) Income from switching in the amount of $21,000 was received and $9,000 therof was attributable to this State in that such portion began and ended here.
>
> Computation of annual tax on gross income. In order to determine the tax on gross income, the taxpayer must compute income arising from transportation activities which began and ended within the State.
>
> Item (5) above contains some income ($1,000) which is taxable on the gross income column of the carrier tax return. Demurrage is considered a transportation activity.
>
> Item (6) above contains some income ($9,000) which is taxable on the gross income column of the carrier tax return. Switching is a transportation activity."

Against this theory, the taxpayer urges that a correct reading of Reg. Act §1.2C.2 produces a contrary conclusion because within such section is the additional statement that "income derived from interstate activities is not subject to the tax on gross income." Reg. Act §1.2C(2). It should be emphasized that tax laws are to be strictly construed, and any doubt as to the meaning of such statutes should be resolved in favor of the taxpayer. *State v. Baltimore and Ohio Railroad Company,* 149 W. Va. 810, page 839, 143 S.E. 2d 331, pg. 348 (1965); *J. D. Moore, Inc. v. Hardesty,* 147 W. Va. 611, 129 S.E. 2d 722 (1963); *Fry v. City of Ronceverte,* 93 W. Va. 388, 117 S.E. 140 (1928). Although we are here dealing with tax regulations, as well as a tax statute, this court is of the opinion that the rule of construction set forth above is equally applicable because regulations affect taxpayers in the same manner as do statutes in implementing the tax laws.

The basis upon which the Tax Commissioner relies in determining that the switching and demurrage activities involved herein began and ended within this state, is the fact that those activities took place entirely within this state. What the Tax Commissioner failed to note, however, was that in such a situation the mere fact, for example, that a part of an interstate journey consists of transportation by an independent agency solely within the boundaries of one state does not make that portion of the trip any less interstate in character. *U.S. v. Yellow Cab Co.,* 332 U.S. 218, 67 S.C. 1560, 91 L. Ed. 2010 (1947). A similar application is found in *Burlington Northern, Inc. v. Department of Revenue,* CCH State Tax Cases Para. 200-792 (Ill. App. 1975) wherein the switching of engines was held to be a part of interstate commerce. The following passage, from *Burlington, supra,* is particularly relevant not only to the taxpayer's switching activities but also its demurrage activities:

> "The issue presented in this regard is whether switching operations, physically conducted wholly within one state, can be considered to be 'moving within interstate commerce' when the cars and engines switched are moving in interstate commerce. The circuit court was of the opinion that they could not. The cases, however, suggest the opposite conclusion. This court held in *LaRue v. Indian Harbor Belt R. R. Co.,* (1st Dist. 1937), 288 Ill. App. 387, 6 N.E. 2d 284, that a car loaded with freight remains in interstate commerce until the car is both delivered to the consignee and unloaded at which time its interstate nature ceases (288 Ill. App. at 395). . . . Thus the more direct connection with interstate activity involved in switching cars to continue their journey to other states would also be considered interstate commerce. Even where a car is being temporarily stored, the interstate character has not been lost. In *Brown v. Illinois Terminal Co.,* (1925), 319 Ill. 326, 150 N.E. 242, 151 A.L.R. 1, a negligence action in which movement in interstate commerce was dispositive, the Illinois Supreme Court held a two-day placement of a car at its storage yards to be only a temporary interruption and not sufficient to remove it from

> interstate commerce. 319 Ill. at 335.
>
> The United States Supreme Court apparently views switching operations as part of interstate commerce as well. In determining whether a train terminal company, which hired out its services to several interstate carriers and owned and operated no cars or engines itself other than switching engines, engaged in interstate commerce such that its employees were protected by Federal legislation, the court held, in *United States v. Brooklyn Eastern District Terminal* (1919), 249 U.S. 296, 303, 307, 39 S. Ct. 283, 63 L. Ed. 613, 16 A.L.R. 527, that it was so engaged and the employees so protected."

Indeed, the Supreme Court of Appeals of West Virginia has followed the same line of reasoning when it held that where there is an inter-connection with another carrier, the total movement is interstate in nature, notwithstanding its activities are solely within one state. See *Gambino v. Jackson,* 150 W. Va. 305, 145 S.E. 2d 124 (1965).

In levying the present tax, the Tax Commissioner has characterized the taxpayer's services as being merely "connected with the interstate movement of railway cars" (Defendant's Brief, pg. 2). It is upon this basis that the Tax Commissioner has segregated the taxpayer's activities from interstate commerce, and in doing so, has acted contrary to the law as cited above.

Upon the aforementioned facts and law, the activities of the taxpayer in West Virginia for which demurrage and switching charges were received should not have been taxed as intrastate commerce. It is, therefore, the opinion of this court that such services are not subject to the tax on gross income pursuant to West Virginia Code, 11-12A-2, but would rather be subject to the tax on apportioned net income under West Virginia Code, 11-12A-3.

2. *The disallowance of carry-back and carry-forward in computing the annual carrier tax on net income.*

Pursuant to West Virginia Code, 11-12A-3, in addition to the tax imposed on gross income, every railroad carrier must pay an annual tax on net income earned within this state. Such tax is determined by ascertaining a sum bearing the proportion of total net income of the carriers that its business done in West Virginia, measured in ton miles, bears to all business done, measured in like fashion.

The taxpayer's computation of net transportation income for 1971 stated that it suffered a net operating loss of $5,436,724.78. Of this, $252,367.00 was carried back to 1970, resulting in no net income for that year from carrier operations in West Virginia. Amounts of $270,527.10 and $953,367.77 were carried forward to 1972 and 1973, respectively, resulting, similarly, in no net income for either year.

The Tax Commissioner disallowed usage of the carry-back and carry-forward upon the theory that such involved nontransportation expenses, which expenses are not relevant to the activity sought to be taxed. In support of his conclusion, the Tax Commissioner relies on Reg. Act §1.3 (D) which is as follows:

> "For the purpose of computing the amount of annual tax on net income, the taxpayer must exclude all nontransportation income. Therefore, the amounts employed in the formula which are designated total gross income and West Virginia gross income must contain only items of income from transportation income.
>
> "Total net income as used in the preceding paragraph shall mean net transportation income of the business. Net transportation income may be determined by employing those rules that are used to compute net income tax due the federal government. However, in determining total net income, the taxpayer may exclude all items of nontransportation income (see §1.1.C1, of these rules) and must exclude any expenses incurred in relation [to] the nontransportation income. In other words, net transportation income is that income computed by federal guidelines without items of nontransportation income or expenses reflected therein."

The Tax Commissioner determined that the taxpayer's carry-back and carry-forward reporting of its 1971 loss involved nontransportation expenses and that, in any event, such expenses have nothing to do with prior years (1970) or future years

(1972-1973) for tax purposes.

Nevertheless, this court cannot ignore the fact that the only evidence in the record, on this point, supports the taxpayer's contention that such net operating loss is attributable to transportation income, rather than nontransportation income (T. 103, Petitioner's Exhibit 6).

Nor can it be ignored that the instructions on the official tax return forms provided by the Tax Commissioner, as well as Reg. Act §1.3D (supra), state that net transportation income is to be computed by employing federal guidelines.

Turning to the 1954 Internal Revenue Code, it is evident that "taxable income" was substituted for "net income" at the time of its revision. Yet, the concept of net income remained unchanged. Internal Revenue Code §63(a) defines "taxable income" as "gross income minus the deduction allowed by this chapter . . . ." One of such deductions allowed in calculating taxable income is Section 172 net operating loss. Income Tax Regulation §1.172-1(a) allows as a deduction in computing taxable income for any taxable year subject to the Code the aggregate of the net operating loss carry-overs and net operating carry-backs to such taxable year. Therefore, it is clear from the Tax Commissioner's regulations and instructions that transportation net income is to be computed by employing federal guidelines, and in such a computation, net operating loss carry-backs and carry-forwards should have been allowed inasmuch as the same are contemplated under federal tax law.

It is, therefore, the opinion of this Court that the Tax Commissioner erred in not allowing carry-back and carry-forward in taxpayer's computation of its carrier net income tax because such were transportation expenses legally allowed as deductions in conformity with federal guidelines.

A proper order in conformity herewith should be promptly tendered for entry. Such order should make this letter memorandum of opinion a part thereof. A copy for that purpose may be obtained from my secretary upon representation of the order.

[Signed] Thomas E. McHugh
Judge

ADMINISTRATIVE DECISION OF THE STATE TAX COMMISSIONER RENDERED ON JULY 5, 1977

Pursuant to a field audit conducted by the Business Tax Division, Richard L. Dailey, then Tax Commissioner of the State of West Virginia, issued an assessment against the above-styled taxpayer on December 8, 1975, for carrier income tax in accordance with the provisions of Chapter 11, Article 12A of the Code of West Virginia of 1931, as amended. The assessment was for the period January 1, 1970 through December 31, 1973 for tax in the amount of $23,913.27 with penalty thereon in the amount of $6,535.53 for a total assessed tax and penalty in the amount of $30,448.80.

Taxpayer filed a timely petition for reassessment and the cause was regularly set for hearing after due notice was given to and received by the taxpayer.

The Hearing Examiner, Priscilla H. Gay, having determined that all proper notices and documents required by law had been timely filed, called the matter on to be heard at 10:00 a.m., EDT on the 19th day of May, 1976, in the State Tax Department at Charleston, West Virginia.

FACTS

The Western Maryland Railway Company (herein also called the taxpayer) is a freight hauling railroad carrier. Its lines extend westward into West Virginia and Pennsylvania from Baltimore, Maryland, where it operates pier facilities.

The present assessment arose as a result of audit findings that the taxpayer had failed during the audit period to report and pay tax due on carrier income derived from switching, storage and demurrage performed in West Virginia, and had failed to report prorated net income earned in West Virginia during that same period.

Switching income consisted of the taxpayer's revenue from the switching of railroad cars between connecting lines and between connecting lines and local industries. During the audit period, the taxpayer had five stations that were capable of performing switching activity for West Virginia. These stations were at Belington, Durbin, Elkins and Hutchinson, West Virginia, and at Luke, Maryland.

The taxpayer stated that no switching activity took place at Belington during the audit. In addition, the taxpayer stated that a unique situation existed at the Luke, Maryland facility because this facility is adjacent to West Virginia. Switches there were actually performed partially in West Virginia and partially in Maryland. All switching traffic through this station either originated in West Virginia and terminated in Maryland or originated in Maryland and terminated in West Virginia.

The taxpayer segregated the switches performed at all of its switching facilities servicing West Virginia in its records according to whether the switches were two point intrastate transportation activities in West Virginia or interstate transportation activity with one point in West Virginia. The taxpayer stated that the two point West Virginia business was subject to the jurisdiction of the West Virginia Public Service Commission (herein also called the WV PSC) and that the one point West Virginia business was subject to the sole jurisdiction of the Interstate Commerce Commission (herein also called the ICC).

Demurrage consisted of the taxpayer's revenues from the detention of cars incident to loading and unloading upon the basis of tariffs regulated by the WV PSC if the shipment being loaded or unloaded was wholly intrastate in nature, or regulated by the ICC if the shipment being loaded or unloaded was solely interstate in nature. During the audit period, the taxpayer had eight reporting stations in West Virginia, some of which had no demurrage revenue at all.

Storage consisted of the loading and unloading of freight by the taxpayer and was classified as intrastate or interstate by the taxpayer by the same criteria used to classify switching and demurrage.

Concerning demurrage, switching, and storage, the taxpayer contended that those revenues resulting from activities which were part of an interstate haul with only one point business in West Virginia were not taxable because these activities were not local in nature, rather they were an integral part of an interstate movement.

The taxpayer also contended that the computations done to determine its net transportation income were in error because net operating loss carry-back and carry-forwards were disallowed.

West Virginia Code §11-12A-6(3), in effect during the audit period, provides that for purposes of determining the net transportation income of a carrier the Commissioner may consider as relevant any determination of net transportation income as made by the taxpayer for purposes of the federal net income tax. Regulation ATC §1.3D, although promulgated subsequent to the audit period, is pertinent inasmuch as it clearly states the Tax Department policy concerning calculation of net transportation income:

> . . . net transportation income is the income computed by federal guidelines without items of nontransportation income or expenses reflected therein.

Therefore, the taxpayer argued that it should have been allowed to use net operating loss carry-back and carry-overs during the audit period in accordance with Section 172 of the Internal Revenue Code. The effect of that would be to reduce net income to zero for that period.

The taxpayer also contended that the auditor used the wrong formula for computing its net income, that is, the assessment used the aggregate of West Virginia revenue ton-miles and non-revenue ton-miles as the numerator but used only revenue ton-miles systemwide as the denominator. The State's representative conceded this error at the hearing.

Finally, the taxpayer argued that reasonable cause for waiver of the statutory penalty exists because of the taxpayer's reasonable and diligent efforts to correctly calculate the tax due on its income during the audit period.

The State contended that demurrage and switching were properly included in the assessment even though the activity may be part of the broad flow of interstate commerce as long as the taxpayer performed all the activity in West Virginia.

The State's representative also contended that the taxpayer's operating loss carry-back and carry-overs were rightfully deleted from the computation of the taxpayer's net income.

Finally, the State contended that no showing of reasonable cause had been made concerning waiver of penalty.

ISSUES AND DETERMINATIONS

The initial issue for determination in the present case is whether all of the taxpayer's income from switching, demurrage and storage taking place within West Virginia either as a part of intrastate or interstate hauls is properly included in the assessment under the gross income provisions of Article 12A of Chapter 11 of the Code.

Code §11-12A-2 imposes the tax on certain carriers and provides that the measure of the tax" . . . shall be equal to the gross income from all business beginning and ending within the State multiplied by the respective rates . . . ." This quote leaves unanswered the question of whether "business beginning and ending within the State" means that the entire transportation activity must begin and end in West Virginia for any of its incident local activities to be taxable or whether only the incident local activities, in this case switching, demurrage and storage must be done within West Virginia to be properly taxable under the provisions of §11-12A.

Although the Regulations for the Annual Tax on Income of Certain Carriers were not in effect until July 1, 1974 and therefore do not directly apply to the present assessment, these regulations may be viewed as persuasive in determining the intended meaning of statutory language in effect both during the audit period and during the period that the regulations are in force.

Reg. ACT §1.2C.2. states in part that:

> The gross income of carriers subject to tax is only that gross income derived from intrastate activities. The tax is applied against the gross income derived from *transportation activities* within the State, such activities being business beginning and ending within West Virginia. Emphasis added.

In addition, Example 3 of Reg. ACT §1.4 is particularly on point. It states in part that:

> XY Railroad Co., a railroad carrier, has the following operations in connection with West Virginia:
>
> (5) Income from demurrage in the amount of $9,000 was received and $1,000 was attributable to this State.
>
> (6) Income from switching in the amount of $21,000 was received and $9,000 thereof was attributable to this State in that such portion began and ended here.
>
> Computation of annual tax on gross income. In order to determine the tax on gross income, the taxpayer must compute income arising from *transportation activities which began and ended within the State.*
>
> Item (5) above contains some income ($1,000) which is taxable on the gross income column of the carrier tax return. *Demurrage is considered a transportation activity.*
>
> Item (6) above contains some income ($9,000) which is taxable on the gross income column of the carrier tax return. *Switching is a transportation activity.* Emphasis added.

From the foregoing, it is apparent that the intent under the gross income provision of the carrier income tax is to apply the tax only where the entire transportation activity began and ended within West Virginia. According to the Regulation provisions quoted above, switching and demurrage are considered to be separate and distinct transportation activities. Therefore, any switching or demurrage taking place solely within the State is necessarily taxable under the gross income provisions of the carrier tax. In the present case, this means that all switching income derived by the taxpayer, except that derived from activity at Luke, Maryland where switches take place partially in Maryland and partially in West Virginia, in State is taxable under the gross income provisions of the carrier tax as a "transportation activity" which began and ended in the State. It is also apparent that demurrage income derived from in-state retention of cars is taxable for the same reason under the gross income provisions of the carrier tax. Finally, by logic, it must be concluded that all storage income derived in-state must also be taxable in a like manner. Therefore, it is determined that the taxpayer's income from switching, demurrage, and storage taking place in West Virginia whether as part of a intrastate or interstate haul is properly included in the assessment under the gross income provisions of Article 12A of Chapter 11 of the Code because they constitute separate and distinct "transportation activities" which began and ended within the State.

The second issue for determination is whether the taxpayer's carry-back in 1970 and carry-overs to 1972 and 1973 of its 1971 net operating loss determined for federal income tax purposes was rightfully disallowed in the computation of the taxpayer's net income.

Chapter 11, Article 12A, Section 6 states in part as follows:

> "The taxpayer under this article shall file an annual return with the state tax commissioner upon a form prescribed by the commissioner setting out the following and such other information as that officer may deem necessary or useful in aid of the assessment and computation of the tax: . . . (3) The net transportation income of the business wherever conducted. For this purpose the tax commissioner may consider as relevant any determination of net transportation income as made by the taxpayer for purposes of the net income tax due the government of the United States under the laws of the United States."

The above quoted statutory language clearly indicates that the use of net transportation income figures as determined by the taxpayer for purposes of the net income tax due the federal government is discretionary with the tax commissioner and not mandatory.

Regulation ATC. §1.3D states in part that:

> "Net transportation income may be determined by employing those rules that are used to compute net income tax due the federal government . . . . In other words, net transportation income is that income computed by federal guidelines without items of non-transportation income or expenses reflected thereon."

From the foregoing, it is determined that net transportation income for purposes of the carrier income tax is net income prior to the deduction of any carry-over or carry-back net operating losses.

Finally, it is determined that reasonable cause of waiver of the statutory penalty has been shown in the taxpayer's resonable though erroneous attempt to correctly interpret a substantial question of law.

THEREFORE, it is the DECISION of Thomas R. Goodwin, Tax Commissioner of the State of West Virginia, that the carrier income tax assessment against Western Maryland Railway Company for the period January 1, 1970 through December 31, 1973 is modified in accordance with the above determined. The taxpayer is therefore indebted to the State of West Virginia for tax in the amount of $23,913.27 with penalty thereon waived in total.

[Signed]
THOMAS R. GOODWIN
STATE TAX COMMISSIONER

7-5-77
Date Rendered

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, TO-WIT:

I, Jon H. Snyder, Director of the Business Tax Division, State Tax Department of the State of West Virginia, do hereby certify that the document attached hereto is a true and accurate copy of an Administrative Decision dated July 5, 1977, and an amendment to the Administrative Decision dated August 1, 1977, rendered by Thomas R. Goodwin, State Tax Commissioner, against Western Maryland Railway Company, wherein it was the decision of the said Tax Commissioner of the State of West Virginia that the assessment issued against Western Maryland Railway Company, for carrier income tax for the years 1970 through 1973, inclusive, be affirmed, as modified, in the amount of $23,784.88, with penalty thereon being waived in full, as the same appears in my office.

Given under my hand this 14th day of April, 1978.

[Signed]
John H. Sydnor, Director
Business Tax Division

My commission expires August 21, 1979.

[Signed]
Robert Preston Hanner
Notary Public

ASSESSMENT OF ADDITIONAL TAX ISSUED BY THE WEST VIRGINIA STATE TAX DEPARTMENT ON DECEMBER 8, 1975

ASSESSMENT OF TAX

FILE NO. 52 600 2670 001 T

Western Maryland Railway Company
Auditor Accounts Payable
2 North Charles Street 206
Baltimore, Maryland 21201

I, Richard L. Dailey, Tax Commissioner of the State of West Virginia, do hereby make the following assessment of taxes and penalties under the provisions of Article 12A, Article 13, Article 15, and Article 15A, Chapter 11, Code of West Virginia of 1931, as amended:

KIND OF TAX	PERIOD	TAX	PENALTY	TOTAL
Carrier Income Tax	1970	$ 2,852.02	$1,483.05	$ 4,335.07
	1-1 to 3-31			
	1971	724.81	289.92	1,014.73
	4-1 to 12-31			
	1971	2,848.48	1,139.39	3,987.87
	1972	6,875.73	1,025.20	8,800.93
	1973	10,612.23	1,697.96	12,310.19
		$23,913.27	$6,535.53	

TOTAL AMOUNT $ 30,443.80

I, Richard I. Dailey, Tax Commissioner of the State of West Virginia, do hereby certify that the foregoing assessment is based upon the best information available and is the correct amount of taxes and penalties due from said taxpayer to the State of West Virginia, and that the same remains wholly unpaid.

Given under my hand this 8th day of December, 1975.

[Signed]
Richard I. Dailey
State Tax Commissioner

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA,TO-WIT:

I, Jon H. Snyder, Director of the Business Tax Division, State Tax Department of the State of West Virginia, do hereby certify that the document attached hereto is a true and accurate copy of the assessment dated December 8, 1975, for carrier income tax issued by the State Tax Department against Western Maryland Railway Company, for the years 1970 through 1973, inclusive, for tax in the amount of $23,913.27, with penalty thereon in the amount of $6,535.53, for a total assessed tax and penalty in the amount of $30,448.80, as the same appears of record in my office.

Given under my hand this 14th day of April, 1978.

[Signed]
Jon H. Snyder, Director
Business Tax Division

Taken, subscribed and sworn to before me this 14th day of April, 1978.

My commission expires August 21, 1979.

[Signed]
Robert Preston Hanner
Notary Public

LETTER OF AUGUST 1, 1977 AMENDING ADMINISTRATIVE DECISION OF JULY 5, 1977

Re: Amendment to Administrative Decision (CIT)
File No. 52 600 2670 001 - Docket No. 76-028T

Gentlemen:

At your request, the record of the carrier income tax hearing held on May 19, 1976 for the above-stated taxpayer has been reviewed. From this review, it is determined that the percentage used in the State auditor's apportionment formula was incorrect. Therefore, the correct percentage, as supplied by Mr. Noel P. Copen, legal representative for the taxpayer at the Administrative Hearing, will be substituted in the apportionment formula as follows:

	Auditor's	Correct Percentage	Tax Reduction
1970	.1212122	.1199998	$ 19.23
1971	.1212120	.1199998	.00
1972	.1212121	.1199998	21.18
1973	.1414143	.1400001	87.98
			$128.39

This letter, which represents my determination of the correct percentages to be used in the carrier tax apportionment formula, will be attached to and become part of the Administrative Decision issued on July 5, 1977. Therefore, Western Maryland Railway Company is indebted to the State of West Virginia for carrier income tax in the corrected amount of $23,784.88.

Very truly yours,
[Signed]
Thomas R. Goodwin
State Tax Commissioner

No. 14636

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

WESTERN MARYLAND RAILWAY
COMPANY, a corporation,

Plaintiff Below, Appellee,

v.

THOMAS R. GOODWIN, Tax
Commissioner of the State
of West Virginia,

Defendant Below, Appellant.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Western Maryland Railway Company, the appellee above named, hereby appeals to the Supreme Court of the United States from the judgment of the Supreme Court of Appeals of West Virginia entered on June 17, 1981 whereby the judgment of the Circuit Court of Kanawha County in favor of the appellee was reversed and upon which the appellee's petition for rehearing was denied on October 8, 1981.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

This Notice of Appeal was filed with the Clerk of the West Virginia Supreme Court of Appeals and with the Clerk of the Circuit Court of Kanawha County, West Virginia, on the 23rd day of December, 1981, pursuant to the Certificate of Service and Proof of Mailing Affidavits attached hereto.

Noel P. Copen

NOEL P. COPEN
Huddleston, Bolen, Beatty,
Porter & Copen
6th Avenue and 10th Street
P. O. Box 2185
Huntington, West Virginia 25722

Counsel for Western Maryland
Railway Company

CERTIFICATE OF SERVICE

The undersigned, counsel of record for Western Maryland Railway Company and a member of the Bar of the Supreme Court of the United States, hereby certifies that a true copy of the Notice of Appeal to the Supreme Court of the United States was served upon Robert Digges, Jr., Assistant Attorney General for the State of West Virginia and counsel of record for Thomas R. Goodwin, Tax Commissioner of the State of West Virginia, by mailing a copy, in a duly addressed envelope, with first-class postage prepaid, on the 23rd day of December, 1981, to:

Robert Digges, Jr.
Assistant Attorney General
Room W-435, State Capitol
Charleston, West Virginia 25305

Noel P. Copen
NOEL P. COPEN
Huddleston, Bolen, Beatty,
Porter & Copen
6th Avenue and 10th Street
P. O. Box 2185
Huntington, West Virginia 25722

(304) 529-6181

PROOF OF MAILING-AFFIDAVIT

The undersigned, counsel of record for Western Maryland Railway Company and a member of the Bar of the Supreme Court of the United States, hereby certifies that a true copy of the Notice of Appeal to the Supreme Court of the United States was filed with the Clerk of the West Virginia Supreme Court of Appeals, by mailing a duly executed copy of the aforesaid Notice in a properly addressed envelope within the time allowed for filing such Notice, with first-class postage prepaid, on the 23rd day of December, 1981, to:

George W. Singleton, Clerk
Supreme Court of Appeals of West Virginia
State Capitol
Charleston, West Virginia 25305

Noel P. Copen
NOEL P. COPEN
Huddleston, Bolen, Beatty,
Porter & Copen
6th Avenue and 10th Street
P. O. Box 2185
Huntington, West Virginia 25722

(304) 529-6181

Taken, subscribed and sworn to before me this 28 day of December, 1981.

My commission expires January 7, 1991.

Notary Public within and for
Cabell County, West Virginia

PROOF OF MAILING-AFFIDAVIT

The undersigned, counsel of record for Western Maryland Railway Company and a member of the Bar of the Supreme Court of the United States, hereby certifies that a true copy of the Notice of Appeal to the Supreme Court of the United States was filed with the Clerk of the Circuit Court of Kanawha County, by mailing a duly executed copy of the aforesaid Notice in a properly addressed envelope within the time allowed for filing such Notice, with first-class postage prepaid, on the 23rd day of December, 1981, to:

Phyllis J. Rutledge, Clerk
Circuit Court of Kanawha County
Kanawha County Courthouse
Charleston, West Virginia 25301

Noel P. Copen
NOEL P. COPEN
Huddleston, Bolen, Beatty,
Porter & Copen
6th Avenue and 10th Street
P. O. Box 2185
Huntington, West Virginia 25722

(304) 529-6181

Taken, subscribed and sworn to before me this 28 day of December, 1981.

My commission expires January 7, 1991.

Notary Public within and for
Cabell County, West Virginia

APPENDED STATUTES AND REGULATIONS

49 U.S.C. §11503 represents a re-enactment of the Interstate Commerce Act with legislative changes up to 1978. The section, added by Pub. L 95-473, 92 Stat. 1445 on October 17, 1978, provides:

(a) In this section —

(1) "assessment" means valuation for a property tax levied by a taxing district.

(2) "assessment jurisdiction" means a geographical area in a State used in determining the assessed value of property for ad valorem taxation.

(3) "rail transportation property" means property, as defined by the Interstate Commerce Commission, owned or used by a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title.

(4) "commercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy.

(b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(1) assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

(2) levy or collect a tax on an assessment that may not be made under clause (1) of this subsection.

(3) levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(4) impose another tax that discriminates against a rail

carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title.

(c) Notwithstanding section 1341 of title 28 and without regard to the amount in controversy or citizenship of the parties, a district court of the United States has jurisdiction, concurrent with other jurisdiction of courts of the United States and the States, to prevent a violation of subsection (b) of this section. Relief may be granted under this subsection only if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent, the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction. The burden of proof in determining assessed value and true market value is governed by State law. If the ratio of the assessed value of other commercial and industrial property in the assessment jurisdiction to the true market value of all other commercial and industrial property cannot be determined to the satisfaction of the district court through the random-sampling method known as a sales assessment ratio study (to be carried out under statistical principles applicable to such a study), the court shall find, as a violation of this section —

(1) an assessment of the rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the assessed value of all other property subject to a property tax levy in the assessment jurisdiction has to the true market value of all other commercial and industrial property; and

(2) the collection of an ad valorem property tax on the rail transportation property at a tax rate that exceeds the tax ratio rate applicable to taxable property in the taxing district.

West Virginia Constitution, Article V, §1, in effect during the period in question [1970-1973] has not been subsequently amended and provides:

The legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time, except that justices of the peace shall be eligible to the legislature.

West Virginia Constitution, Article VI, § 1, in effect during the period in question [1970-1973] has not been subsequently amended and provides:

The legislative power shall be vested in a senate and house of delegates. The style of their acts shall be, "Be it enacted by the Legislature of West Virginia."

West Virginia Code §11-12A-2, as in effect during the period in question [1970-1973], provided.

Every motor vehicle carrier operating on the public highways of this State and every railroad car carrier, railroad carrier, express company, pipeline company, telephone and telegraph company, airline company and any person operating a steamboat or other watercraft, for the transportation of passengers or freight, doing business in the State shall pay to the State an annual tax for each calendar year. This tax shall be equal to the gross income from all business beginning and ending within the State multiplied by the respective rates as follows: Motor vehicle carriers, railroad car carrier, railroad carrier, express companies, pipeline companies, airline companies, any person operating a steamboat or other watercraft and telegraph companies, three and three-tenths percent, and telephone companies, three and seventy-four one hundredths percent: Provided, that any motor vehicle carrier which is an urban or suburban bus line shall be taxed at the rate of one and sixty-five one hundredths percent of such gross income and any motor vehicle carrier which is a taxi or cab company or a company which hauls waste, refuse or garbage shall be taxed at the rate of two and five-tenths percent of such gross income.

West Virginia Code §11-12A-3, as in effect during the period in question [1970-1973], read:

In addition to the tax imposed in the preceding section [§ 11-12A-2], every motor vehicle carrier operating on the public highways of the State and every railroad carrier, railroad car carrier, express company, pipeline company, telephone and telegraph company, airline company and any person operating a steamboat or other watercraft for the transportation of passengers or freight, doing business in this State shall pay an annual tax for each calendar year on the net income earned within the State equal to three and seventy-four one hundredths percent of such net income for telephone companies and six and six-tenths percent of such net income for all other carriers included in this section: Provided, that any motor vehicle carrier which is an urban or suburban bus line or a taxi or cab company or a company which hauls waste, refuse or garbage, five percent of such net income. Net income shall be determined as follows:

(a) The net income of motor vehicle carriers earned within the State shall be determined by ascertaining a sum bearing the proportion to the total net income of the motor vehicle carrier that its business done in West Virginia measured in motor vehicle miles of motor vehicle carrier operation, bears to all business done, measured in like fashion;

(b) The net income of railroad carriers earned within the State shall be determined by ascertaining a sum bearing the proportion to total net income of the carriers that its business done in West Virginia, measured in ton-miles, bears to all business done, measured in like fashion;

(c) The net income of railroad car carriers and express companies earned within the State shall be determined by ascertaining a sum bearing the proportion to the total net income of the carriers or company that its business done in West Virginia, measured in car-miles of car operation, bears to all business done, measured in like fashion: Provided, however, that nothing in this article shall be construed as applying to railroad freight car carriers not owned by railroad carriers or their subsidiaries;

(d) The net income of pipeline companies earned within the State shall be determined by ascertaining a sum bearing the proportion to the total net income of the company that its business done in West Virginia, measured in barrel-miles in the case of oil and liquid coal or slurry and of thousand cubic feet-miles in the case of gas, bears to all business done, measured in like fashion;

(e) The net income of airline companies and any person operating a steamboat or other watercraft for the transportation of passengers or freight earned within the State shall be determined by ascertaining a sum bearing the proportion to the total net income of the corporation that its business done in West Virginia, measured in passenger-miles in the case of airline companies and ton-miles in the case of any person operating a steamboat or other watercraft, bears to all business done, measured in like fashion;

(f) The net income of telephone and telegraph companies shall be determined by ascertaining a sum bearing the proportion to the total net income of the companies that its business done in West Virginia, measured in wire-miles, bears to all business done, measured in like fashion;

(g) In computing the tax imposed by this section, the total net income of a taxpayer who shall have been taxed under the preceding section [§ 11-12A-2], shall be reduced by an amount bearing the proportion to such total net income that the gross income of the taxpayer which is the measure of the tax under the preceding section bears to its total gross income from all business done wherever conducted. No county, city, town, village or other political subdivision of the State shall levy a license, net income or any other kind of tax on the business taxed under this article.

West Virginia Code § 11-12A-6, as in effect during the period in question [1970-1973], read:

The taxpayer under this article shall file an annual return with the state tax commissioner upon a form prescribed by the commissioner setting out the following and such other information as that officer may deem necessary or useful in aid of the assessment and computation of the tax:

(1) The gross income from all transportation business done within the State, namely, business beginning and ending entirely within the State;

(2) The total gross income of the business wherever conducted;

(3) The net transportation income of the business wherever conducted. For this purpose the tax commissioner may consider as relevant any determination of net transportation income as made by the taxpayer for purposes of the net income tax due the government of the United States under the laws of the United States;

(4) The total amount of business done in this State, measured in the units hereinbefore prescribed. The tax commissioner may designate a single month in the tax year as the period for which the amount of business done in this State, measured in the units hereinbefore prescribed, shall be reported and shall fix the total amount of business done in the State for the whole tax year by multiplying the amount determined for the designated month by twleve;

(5) The total amount of business done, wherever conducted, measured in the units hereinbefore prescribed.

Every return shall be signed and sworn to by the taxpayer, if a natural person, and if a corporation, shall be signed and sworn to by its president, vice president, secretary or principal accounting officer.

West Virginia Code § 11-24-3(11), being that portion of the aforesaid section relevant to this case, provides:

(11) The term "West Virginia taxable income" means the taxable income of a corporation as defined by the laws of the United States for federal income tax purposes, adjusted as provided in section six [§ 11-24-6] of this article: Provided, that in the case of a corporation having income from business activitity which is taxable without this State, its "West Virginia taxable income" shall be such portion of its taxable income as so defined and adjusted as is allocated or apportioned to this State under the provisions of section seven [§ 11-24-7] of this article.

West Virginia Code § 11-24-4 provides:

(1) In the case of taxable years beginning after the thir-

tieth day of June, one thousand nine hundred sixty-seven, a tax is hereby imposed for each taxable year at the rate of six per centum per annum on the West Virginia taxable income of every domestic or foreign corporation engaging in business in this State or deriving income from property, activity or other sources in this State, except corporations exempt under section five [§ 11-24-5].

(2) In the case of a taxable year beginning on the first day of January, one thousand nine hundred sixty-seven, and ending on the thirty-first day of December, one thousand nine hundred sixty-seven, a tax of one half of the rate set forth in subsection (1) is hereby imposed for such taxable year on the West Virginia taxable income of every domestic or foreign corporation engaging in business in this State or deriving income from property, activity or other sources in this State, except corporations exempt under section five.

(3) In the case of taxable years, other than the year beginning on the first day of January, one thousand nine hundred sixty-seven, beginning after the thirtieth day of June, one thousand nine hundred sixty-six, and before the first day of July, one thousand nine hundred sixty-seven, a tax is hereby imposed on the West Virginia taxable income of every domestic or foreign corporation engaging in business in West Virginia or deriving income from property, activity or other sources in this State, except corporations exempt under section five, in an amount equal to that portion of the tax calculated in the manner set forth in subsection (1) which the number of days in such taxable year after the thirtieth day of June, one thousand nine hundred sixty-seven, bears to the total number of days in such taxable year. (1967, c. 197.)

West Virginia Code § 11-24-6, as relevant to this case, provides in part:

(a) *General.*—In determining the West Virginia taxable income of a corporation, its taxable income as defined for federal income tax purposes shall be adjusted by the items specified in this section.

(b) *Adjustments increasing federal taxable income.*—There shall be added to federal taxable income (unless already included in the computation of federal taxable income):

(1) Interest or dividends on obligations or securities of any state or of a political subdivision or authority thereof (other than this State and its political subdivisions and authorities), unless made exempt by compact or agreement to which this State is a party;

(2) Interest or dividend income on obligations or securities of any authority, commission or instrumentality of the United States which the laws of the United States exempt from federal income tax but not from state income taxes;

(3) Income taxes imposed by this State or any other taxing jurisdiction, to the extent deductible in determining federal taxable income and not credited against federal income tax, and the taxes imposed by this State for which credit against the taxes imposed by section four [§ 11-24-4] is allowed by section nine [§ 11-24-9]; and

(4) Interest on indebtedness incurred or continued to purchase or carry obligations or securities the income from which is exempt from tax under this article, to the extent deductible in determining federal taxable income.

(c) *Adjustments decreasing federal taxable income.*—There shall be subtracted from federal taxable income:

(1) Interest income on obligations of the United States and its possessions to the extent includable in gross income for federal income tax purposes;

(2) Interest or dividend income on obligations or securities of any authority, commission or instrumentality of the United States to the extent includable in gross income for federal income tax purposes, but exempt from state income taxes under the laws of the United States;

(3) Any gain from the sale or other disposition of property having a higher fair market value on the first day of July, one thousand nine hundred sixty-seven, than the adjusted basis at said date for federal income tax purposes: Provided, that the amount of this adjustment is limited to that portion of any such gain which does not exceed the difference between such fair market value and such adjusted basis;

(4) The amount of any refund or credit for overpayment of

income taxes imposed by this State or any other taxing jurisdiction, to the extent properly included in gross income for federal income tax purposes;

(5) The amount of dividends received, to the extent included in federal taxable income; and

(6) Thirty-seven and one-half percent of the excess of net long-term capital gain over net short-term capital loss as defined in the laws of the United States.

(d) *Adjustment resulting from recomputation of net operating loss deduction.*—In determining the West Virginia taxable income of a corporation entitled to a net operating loss deduction for the taxable year for federal income tax purposes, there shall be added to or subtracted from the federal taxable income the amount of an adjustment reflecting a recomputation of such net operating loss deduction in which the adjustments required by subsections (b) and (c) are made for each taxable year involved in the computation of such net operating loss deduction.

West Virginia Code § 11-24-9 provides:

(a) *Credit for taxes imposed under article thirteen, chapter eleven of this Code.*—A credit shall be allowed against the tax imposed by this article equal to the amount of the liability of the taxpayer for the taxable year for any tax imposed under article thirteen [§ 11-13-1 et seq.], chapter eleven of this Code: Provided, that the amount of such business and occupation tax credit shall not exceed the portion of the tax imposed by this article which is attributable to the West Virginia taxable income derived by the taxpayer for the taxable year from the business or occupation with respect to which said tax under article thirteen was imposed and shall not in any event exceed the tax imposed by this article for such taxable year: Provided further, that no such credit shall be allowed for any tax imposed under article thirteen with respect to any period prior to the first day of July, one thousand nine hundred sixty-seven.

For purposes of this section, the tax imposed under article thirteen [§ 11-13-1 et seq.] of chapter eleven of this Code shall be the amount of the liability of the taxpayer for such tax under said article thirteen computed without reduction for the tax credit for industrial expansion allowed for such year.

(b) *Credit for taxes imposed under article twelve-A, chapter eleven of this Code.*—A credit shall be allowed against the tax imposed by this article equal to the amount of the liability of the taxpayer for the taxable year for any tax imposed on the taxpayer under article twelve-A [§ 11-12A-1 et seq.], chapter eleven of this Code: Provided, that the amount of such credit shall not exceed the portion of the tax imposed by this article which is attributable to the West Virginia taxable income derived by the taxpayer for the taxable year from any source with respect to which said tax under article twelve-A was imposed and shall not in any event exceed the tax imposed by this article for such taxable year: Provided further, that no such credit shall be allowed for any tax imposed under article twelve-A with respect to any period prior to the first day of July, one thousand nine hundred sixty-seven. (1967, c. 197; 1969, lst Ex. Sess., c. 9.)

Maryland Ann. Code Article 81, Sec. 129, in effect during the period in question [1970-1973], provided:

The phrases "gross receipts," "total receipts," "gross earnings," "total earnings" and "all earnings," as used in §§ 130 to 134, inclusive, mean in the case of railroads and other public service corporations, the operating revenues thereof, without any deductions or credits of any kind whatsoever. When any public service corporation is engaged in more than one class of business and one or more classes thereof is business not subject to the gross receipts tax or subject thereto at different rates, the operating revenues of the class or classes of business subject to such tax at different rates shall be reported separately and taxed at the rate or rates applicable to such class or classes of business. This section shall not be construed as implying that in the absence of this section the requirements of §§ 130 to 134, inclusive, could properly be otherwise construed.

West Virginia Annual Tax on Incomes of Certain Carriers

(ATC) Regulation § 1.3D provides:

D. *Exclusions from Income.*

For the purpose of computing the amount of annual tax on net income, the taxpayer must exclude all nontransportation income. Therefore, the amounts employed in the formula which are designated total gross income and West Virginia gross income must contain only items of income from transportation activities. See § 1.2. C.1. of these rules and regulations as to nontransportation income.

Total net income as used in the preceding paragraph shall mean net transportation income of the business. Net transportation income may be determined by employing those rules that are used to compute net income tax due the federal government. However, in determining total net income, the taxpayer may exclude all items of nontransportation income (see § 1.2. C.1 of these rules) and must exclude any expenses incurred in relation [to] the nontransportation income. In other words, net transportation income is that income computed by federal guidelines without items of nontransportation income or expenses reflected therein.

West Virginia ATC Regulation § 1.4, Examples 2 and 3 are as follows:

Example 2. BC, a barge line company, moves coal barges on the Monangahela River from Morgantown, West Virginia, to Pittsburgh, Pennsylvania. It has no other transportation activities within this State but does own docking facilities and maintains several employees within this State. Therefore, BC is subject to the tax on net income but is not subject to the tax on gross income inasmuch as it has no transportation business which begins and ends within West Virginia.

For purposes of this illustration, it is assumed that the barge trip from Morgantown to Pittsburgh is 75 miles, 15 of which are within this State. It is also assumed that for the entire year that BC had activities from everywhere that totaled 7,500 ton-miles and West Virginia ton-miles of 1,500.

BC's total gross income for the year was $50,000. Its total net income was $2,000 and was computed by employing federal rules. In arriving at total net income, to be used as the starting point to determine tax on net income, BC eliminated all nontransportation income and expenses pertaining thereto. Nontransportation income was also eliminated to arrive at total gross income.

Example 3. XY Railroad Co., a railroad carrier, has the following operations in connection with West Virginia:

(1) Daily operation of a passenger train from Cincinnati, Ohio, to Washington, D.C., and return. This run, for the year 1972, totaled 4,000 passenger-miles of which 1,800 were pass-through miles within West Virginia. Total income from this run was $500,000.

(2) Daily operation of a freight train between the same two localities. This run totaled 7,000 ton-miles of which 3,000 were pass-through miles within West Virginia. Total income was $1,000,000.

(3) Operation of a freight train from Charleston, West Virginia, to Richmond, Virginia, and return. This run totaled 5,000 ton-miles of which 3,000 were within this State. Total income was $580,000.

(4) Operation of a freight train from Charleston, West Virginia, to Logan, West Virginia, and return. This run totaled 3,000 ton-miles of which all were within this State. Income from this run, for the taxable year, was $990,000.

(5) Income from demurrage in the amount of $9,000 was received and $1,000 was attributable to this State.

(6) Income from switching in the amount of $21,000 was received and $9,000 thereof was attributable to this State in that such portion began and ended here.

Computation of annual tax on gross income. In order to determine the tax on gross income, the taxpayer must compute income arising from transportation activities which began and ended within the State.

Item (1) above is not subject to the tax on gross income since such traffic did not begin and end within this State.

Item (2) above also does not meet the essential requirements of two-point business; therefore, such item is not reported for the tax on gross income.

Item (3) above is not taxable on gross income. Same reason as Items (1) and (2) applies.

Item (4) above is subject to the tax on gross income inasmuch as such income arose from two-point activities.

Item (5) above contains some income ($1,000) which is taxable on the gross income column of the carrier tax return. Demurrage is considered a transportation activity.

Item (6) above contains some income ($9,000) which is taxable on the gross income column of the carrier tax return. Switching is a transportation activity.

Therefore, under the gross income column of the carrier tax return, XY Railroad Co. will report taxable income of $1,000,000. Said amount is the sum of Item (4) in whole, Item (5) in part and Item (6) in part.

Computation of annual tax on net income. In order to determine its tax liability on net income, XY Railroad Co. must prepare the formula on the reverse side of the carrier tax return. The explanation which follows of such computation is numbered and set forth as the apportionment formula is on the return.

A. *Total Net Income.* It is assumed for this illustration that XY's net income, computed by the federal methods, was *$200,000.* Items of income, loss, gain and deduction which pertain to nontransportation activities have been excluded from net income.

B. *Total Gross Income.* This is the gross amount of all transportation income from wherever derived. The total of Items (1) through (6) is *$3,100,000.* Any nontransportation income received by a carrier is not to be reflected within this amount.

C. *West Virginia Gross Income.* West Virginia gross income is that income which inures to XY as a result of two-point transportation activities within the State. In other words, this amount should equal that reported under the gross income column *($1,000,000)* on the carrier return.

D. *Remaining Gross Income.* This figure is arrived at by subtracting C. from B. Therefore, $3,100,000 less $1,000,000 equals *$2,100,000.*

E. *Net Income to Be Prorated.* This amount of net income is found by multiplying A. and D. and dividing the result by

B. The result in this situation is *$135,484*.

F. Carrier-miles in West Virginia. At this point, XY must total all ton-miles traveled in this State. Said amount is derived from all ton-miles traveled in West Virginia, both intrastate and interstate movements. In other words, ton-miles in West Virginia are those ton-miles moved in one-point, two-point and pass-through business.

In computing mileage for this line of the formula, XY will exclude that mileage in Item (1) above. Passenger-miles are not included in the computation of this mileage factor, except for airline companies and motor vehicle carriers. A railroad carrier would, however, report gross income and pay tax thereon from a passenger operation which begins and ends in the State. But passenger-miles, for railroad carriers, are excluded from the formula.

Total ton-miles in West Virginia are *14,000,* composed of 3,000 ton-miles from Item (2), 3,000 ton-miles from Item (3) and 8,000 ton-miles from Item (4).

G. *Miles in All States.* For railroad carriers ton-miles in all states must be computed. Passenger-miles are again excluded. Therefore, in computing this line item of the formula, XY will ignore Item (1) above. Total ton-miles in all states will be computed from Items (2), (3), and (4). These three total *20,000* ton-miles.

H. *West Virginia Net Income.* This reduced amount of West Virginia taxable income is determined by multiplying E. by F. and dividing the result by G. This computation results in a figure of *$94,839* which is XY's West Virginia taxable net income to be reported under the net income column of the carrier income tax return.

Supplemental
Brief

Office - Supreme Court, U.S.
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NO. 81-1259

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

WESTERN MARYLAND RAILWAY COMPANY,
a corporation,

Appellant,

v.

HERSCHEL H. ROSE, III,
Tax Commissioner of the State of West Virginia,

Appellee.

ON APPEAL FROM THE
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

SUPPLEMENT TO JURISDICTIONAL STATEMENT

NOEL P. COPEN
COUNSEL OF RECORD
FOR APPELLANT
Huddleston, Bolen, Beatty,
Porter & Copen
P. O. Box 2185
Huntington, West Virginia 25722
(304) 529-6181

AMENDED DESIGNATION OF CORPORATE RELATIONSHIPS

The Western Maryland Railway Company, a Maryland corporation, states that:

This is its second Designation of Corporate Relationships. The Designation that was originally filed as part of its jurisdictional statement is currently accurate, except for its statement of the affiliates of the Western Maryland Railway Company. Current information on the affiliates of the Western Maryland Railway Company appears below.

The Western Maryland Railway Company does not have any affiliates, except for the corporations which are listed below that are not wholly-owned subsidiaries of CSX Corporation, the parent corporation of Western Maryland Railway Company, but in which the CSX Corporation has a controlling interest. These subsidiaries of CSX Corporation, together with the percent of control of each subsidiary, are as follows:

Eastern Hardwoods, Incorporated	60.0%
James Center Development Company	99.9%
Mid Allegheny Corporation	99.9%
New Gauley Coal Corporation	74.6%
Littleton Fuel Company	60.3%
The Baltimore and Ohio Railroad Company	98.9%
The Baltimore and Philadelphia Railroad Company	99.8%
The Cleveland Terminal & Valley Railroad Company	99.9%
Dayton and Michigan Railroad Company	75.1%
Dayton and Union Railroad Company	95.6%
Chicago South Shore and South Bend Railroad	94.2%

Fruit Growers Express Company	54.6%
Richmond-Washington Company	80.0%
Richmond, Fredericksburg and Potomac Railroad Company	65.3%
Richmond Land Company	65.2%
Atlanta and West Point Railroad Company	62.6%
Columbia, Newberry and Laurens Railroad Company	97.0%
Durham and Southern Railway Company	99.9%
Monon Coal Company, Inc.	92.0%
Louisville, Henderson & St. Louis Railway Company	97.0%
Nashville & Decatur Railroad Company	55.5%
North Charleston Terminal Company	66.7%
Park-N-Shop, Inc.	94.2%
The South Carolina Pacific Railway Company	91.9%
The Western Railway of Alabama	66.1%

All other subsidiaries of CSX Corporation are wholly-owned.

Dated: April 15, 1982.

Respectfully submitted,

Noel P. Copen
Counsel for Appellant
Huddleston, Bolen, Beatty,
Porter & Copen
P. O. Box 2185
Huntington, West Virginia 25722
(304) 529-6181

Motion to Dismiss or Affirm

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MOTION TO DISMISS OR AFFIRM

Of Counsel

CHAUNCEY H. BROWNING
Attorney General

JACK C. McCLUNG
Deputy Attorney General

E. WAYNE BASCONI
Assistant Attorney General

State Capitol
Charleston, West Virginia
25305

ROBERT DIGGES, JR.
Assistant Attorney General
for the State of West Virginia
State Capitol, W-435
Charleston, West Virginia 25305
(304) 348-2522

Counsel for Appellee
Herschel H. Rose, III

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Tax Commissioner
of the State of West Virginia,

Appellee.

ON APPEAL FROM THE
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OF WEST VIRGINIA

MOTION TO DISMISS OR AFFIRM

The appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Appeals of West Virginia on the grounds that it is manifest that this appeal does not present a substantial federal question, that the judgment below clearly rests on an adequate nonfederal basis, and on other grounds which the appellee will present herein which establish that this Court should not set this case for argument.

OPINIONS BELOW

The opinion below by Justice Neely of the Supreme Court of Appeals of West Virginia is reported in Western Maryland Ry. Co. v. Goodwin, ___ W. Va. ___, 282 S.E.2d 240 (1981). A copy of the opinion below is set out in full in the Appendix, appended to appellant's Jurisdictional Statement.

The January 3, 1979, memorandum opinion of the Circuit Court of Kanawha County, West Virginia, and the Kanawha County Circuit Court's judgment of March 30, 1979, are set out in full in the Appendix, appended to appellant's Jurisdictional Statement.

JURISDICTION

The proceeding below began with an assessment of tax under the West Virginia carrier income tax, Chapter 11, Article 12A, of the West Virginia Code of 1931, as amended. The assessment was upheld by the Tax Commissioner of the State of West Virginia upon evidence taken at an administrative hearing. Upon timely appeal to the Circuit Court of Kanawha County, the Tax Commissioner's decision was reversed and the assessment was expunged. The circuit court's decision was reversed by the Supreme Court of Appeals of West Virginia and judgment was entered in favor of the appellee.

The judgment of the Supreme Court sought to be reviewed was entered on July 17, 1981. Subsequently, the appellant petitioned for a rehearing, which petition was denied by order entered October 8, 1981. The appellant then filed a notice of appeal to this Court with the

Supreme Court of Appeals of West Virginia on December 23, 1981.

The asserted jurisdiction of the Supreme Court to hear this appeal rests upon 28 U.S.C. § 1257(2).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in Section 1 as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." United States Constitution, Fourteenth Amendment, Section 1.

The relevant portions of the Commerce Clause of the Constitution, as found in Article I, Section 8, provide as follows:

> "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;
>
> "To borrow Money on the credit of the United States;
>
> "To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes." United States Constitution, Article I, Section 8.

West Virginia Code of 1931, as amended, Chapter 11, Article 12A, Section 2, which is set out in full in the Appendix appended to appellant's Jurisdictional Statement.

West Virginia Code of 1931, as amended, Chapter 11, Article 12A, Section

3, which is set out in full in the Appendix appended to appellant's Jurisdictional Statement.

West Virginia Code of 1931, as amended, Chapter 11, Article 12A, Section 6, which is set out in full in the Appendix appended to appellant's Jurisdictional Statement.

West Virginia Code of 1931, as amended, Chapter 11, Article 24, Section 9, which is set out in full in the Appendix appended to appellant's Jurisdictional Statement.

Maryland Code Ann., Article 81, Section 129, which is set out in full in the Appendix appended to appellant's Jurisdictional Statement.

West Virginia Annual Tax on Incomes of Certain Carriers (ATC) Regulation § 1.3D, which is set out in full in the Appendix appended to appellant's Jurisdictional Statement.

QUESTIONS PRESENTED

The appellee respectfully disagrees with the appellant's presentation of the questions raised by the Jurisdictional Statement and feels the following more fairly represents the questions presented for review:

Whether there are sufficient ascertainable standards contained in West Virginia's carrier income tax statutes to insure the uniform administration of the carrier net income tax, Code 11-12A-3, in pursuance of the West Virginia Legislature's objectives in promulgating the tax.

Whether there is an inconsistency between the West Virginia Tax Commissioner's carrier tax regulations and his computation of appellant's carrier net income tax liability which would constitute a violation of appellant's due process rights under the Fourteenth Amendment.

Whether there is an interrelationship between the West Virginia carrier net income tax, Code 11-12A-3, and the West Virginia corporate net income tax, Code 11-24-1 et seq., which would require the computation of both taxes on the same basis to avoid a violation of equal protection guarantees under the Fourteenth Amendment.

Whether West Virginia's carrier gross income tax, Code 11-12A-2, levied on appellant's business activities beginning and ending in-State, imposes an unconstitutional burden on interstate commerce in violation of the Commerce Clause's protection against multiple taxation.

STATEMENT OF THE CASE

Western Maryland Railway Company is a freight hauling railroad carrier incorporated in the State of Maryland and qualified to do business in West Virginia. Among its other activities, Western Maryland is engaged in switching railcars between connecting line haul tracks and between line haul track and local spurs. It receives separate payments for this switching. It is also paid a separate tariff for undue detention of its cars by customers in loading and unloading, and this tariff is known as demurrage. Western Maryland classified the revenue from switching and demurrage as "intrastate" or "interstate" depending upon the prior and subsequent line haul portion of the cars' movement. If the prior movement originated outside of West Virginia or if the subsequent destination was a point outside of the State, the revenue was labeled "interstate." Only when the origin and destination of the car were both within West Virginia did the railway classify the income generated as "interstate." The switching and demurrage Western Maryland called interstate is regulated by the Interstate Commerce Commission while the West Virginia Public Service Commission has jurisdiction over the switching and demurrage appellee called intrastate.

During the years covered by the audit Western Maryland reported its income from what it designated interstate switching and demurrage under Code 11-12A-3 [1967, 1971] for carrier income tax purposes. The West Virginia Tax Department determined, pursuant to its audit, that all income from switching services performed and detention of cars wholly within West Virginia should be reported and taxed under the provisions of Code 11-12A-2 [1967, 1971], regardless of appellee's characterization as intrastate or interstate. A portion of the 1977 assessment against Western Maryland was due to this reclassification.

Western Maryland also computed its net transportation income for 1971 in accordance with federal income tax methods. This resulted in a net operating loss for that year. Consonant with federal tax practices, it then carried portions of that loss back to 1970 and forward to 1972 and 1973, the result being that Western Maryland showed no West Virginia net income for any of those years. The West Virginia State Tax Department determined that these loss carrybacks and carry-forwards were inappropriate in computing West Virginia net carrier income and recomputed Western Maryland's tax after disallowing the loss distributions.

The assessment was made against Western Maryland in 1975 for carrier income taxes for the years 1970 through 1973, and the assessment was affirmed, less penalty, by the West Virginia State Tax Commissioner in his administrative decision issued on July 5, 1977. Western Maryland appealed the Tax Commissioner's administrative decision to the Circuit Court of Kanawha County where the decision was overruled and the assessment vacated.

The Kanawha County Circuit Court held with respect to the gross income tax portion of the assessment that Code 11-12A-2 was limited to business which could be characterized as purely intrastate, and due to the activities involved connection with interstate commerce, such activities were not within the scope of Code 11-12A-2. With respect to the net income tax assessment, the circuit court held that the instructions on the official carrier income tax return forms, as well as pertinent administrative regulations, provided that transportation income was to be computed by employing federal guidelines. Therefore, the court reasoned that since carry-over and carryback deductions were allowed under the federal tax, they should be allowed in computing a tax by federal guidelines. The West Virginia State Tax Commissioner appealed the circuit court's decision to the West Virginia Supreme Court of Appeals.

On July 17, 1981, the West Virginia Supreme Court of Appeals reversed the Circuit Court of Kanawha County holding that revenues from "business beginning and ending" in West Virginia, regardless of interstate connections, were within the intended scope of Code 11-12A-2. The West Virginia Supreme Court further held that loss distributions were improper in computing the annual tax on yearly income imposed by Code 11-12A-3.

ARGUMENT

I.

CHAPTER 11, ARTICLE 12A, SECTION 3, OF THE WEST VIRGINIA CODE OF 1931, AS AMENDED, PROVIDES SUFFICIENT ASCERTAINABLE STANDARDS TO INSURE THE WEST VIRGINIA STATE TAX COMMISSIONER'S UNIFORM ADMINISTRATION OF THE TAX IMPOSED, PURSUANT TO THE LEGISLATIVE OBJECTIVES STATED THEREIN.

Code 11-12A-3 imposes an annual tax on the net income of certain carriers. Said statute, as in effect during the period at issue, 1970-1973, is set out in full beginning on page 56A of the Appendix to appellant's Jurisdictional Statement. The appellee submits that the carrier net income tax statute, itself, provides sufficient ascertainable standards to guide the proper administration of the tax.

Code 11-12A-3 provides the carriers subject to the tax, the type of income to be taxed, the time period of the tax, apportionment formulas to determine the measure of the tax, and the rate of the tax. The West Virginia Legislature clearly in said statute fully exercised its authority to effectuate its legislative objective--the yearly taxation of the net transportation income of certain carriers. The West Virginia State Tax Commissioner, the administrator of the tax, is merely delegated the authority to determine the validity of a taxpayer's computation of its net transportation income. Such authority may be exercised only in accordance with the intended scope of the tax as prescribed by the Legislature.

The West Virginia Legislature in Code 11-12A-6(3), to ease the computation and administration of the carrier tax, went beyond normal tax enactment legislation and addressed the actual computation of the tax as follows:

> "(3) The net transportation income of the business wherever conducted. For this purpose the tax commissioner may consider as relevant any determination of net transportation income as made by the taxpayer for purposes of the net income tax due the government of the United States under the laws of the United States." (Emphasis supplied.)

The emphasized language of the above subsection came as a result of a 1967 amendment to the statute. The 1967 amendment was undoubtedly in response to the West Virginia Supreme Court of Appeal's decision in State ex rel. Battle v. Baltimore and Ohio Railroad Company, 149 W. Va.

810, 143 S.E.2d 331 (1965), which interpreted the statute's pre-amendment language as requiring the Tax Commissioner to accept a carrier's federally computed taxable income as its net transportation income. The Legislature apparently recognized that such interpretation defeated the objective of the tax and amended the statute to its present form to reaffirm the discretion delegated to the Tax Commissioner by Code 11-12A-3 to determine yearly net transportation income.

Appellant questions the standards by which West Virginia's carrier net income tax is to be computed without analyzing the statute that imposes the tax. Only by reviewing the statute which actually enacts the tax can one determine whether there are sufficient standards for its uniform and proper administration. The appellee contends that the West Virginia Legislature, in enacting the carrier net income tax, properly exercised its legislative power. In Code 11-12A-3 the

Legislature stated the legislative objective, the taxation of carrier net income on an annual basis, prescribed the method of achieving that objective by designating the subject, measure and rate of the tax, and laid down standards to guide the administrative determination of the computation of the tax. This Court in Lichter v. United States, 334 U.S. 742, 92 L. Ed. 1694, 68 S. Ct. 1294 (1948), found that a delegation of authority by the United States Congress to an administrative tribunal under the Renegotiation Act to determine "excessive profits" was constitutionally sound since the determination was to be made according to the stated purposes of the Act. In the instant case, the Tax Commissioner is simply delegated the authority to compute the transportation income of a taxpayer in accordance with the statutorily established scope of the tax.

This Court in American Power and Light Co. v. S.E.C., 329 U.S. 90, 91 L. Ed. 103, 67 S. Ct. 133 (1946), examined a delegation of authority by Congress to the S.E.C. and noted that the legislative process would frequently bog down if Congress were constitutionally required to appraise beforehand the myriad situations to which it wishes a particular policy to be applied and to formulate rules for each situation. This Court then acknowledged that:

> "Necessity therefore fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules; it then becomes constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority. Private rights are protected by access to the courts to test the application of the policy in the light of these legislative declarations. * * *" Id. at 105.

In the present case, the West Virginia Supreme Court reviewed the Tax Commissioner's determination of appellant's net transportation income and found it to conform with the West

Virginia Legislature's policy as expressed in the tax statute itself. The West Virginia Supreme Court observed the following:

> "Our statute imposes a yearly tax on each year's income; the statute gives no credit for prior or future losses. This is in sharp contrast to the explicit authority in I.R.C. § 172 (1976). If the Legislature had intended such a credit they would have given it directly, and it is unreasonable to infer from the general authority allowed in Code, 11-12A-6 [1967] to use federal forms for accounting purposes that a substantive benefit of considerable magnitude was intended to be conferred in direct controvention of the plain words of Code, 11-12A-3 [1967]."

The West Virginia Tax Commissioner's discretion in computing net transportation income is clearly a delegable administrative function necessitated upon the impracticality of the West Virginia Legislature formulating specific rules for every conceivable instance in which federal taxable income does not accurately reflect a taxpayer's annual transportation income.

Code 11-12A-3 provides standards more than sufficient to allow the West Virginia State Tax Commissioner to uniformly administer the carrier net income tax pursuant to the Legislature's objectives stated therein. Appellant's argument ignores such standards and therefore misrepresents the extent of the Legislature's grant of discretionary authority. The Tax Commissioner's discretion in computing transportation net income is strictly limited by the subject of the tax and accordingly does not represent an unconstitutional grant of the legislative power to tax.

II.

THE WEST VIRGINIA STATE TAX COMMISSIONER'S RECOMPUTATION OF APPELLANT'S NET TRANSPORTATION INCOME, DISALLOWING LOSS DISTRIBUTIONS, IS CONSISTENT WITH THE GUIDELINES ESTABLISHED IN THE CARRIER INCOME TAX ADMINISTRATIVE REGULATIONS AND MORE IMPORTANTLY IS CONSISTENT WITH THE SUBJECT OF THE TAX IMPOSED.

Appellant contends that the West Virginia Tax Commissioner failed to follow carrier net income tax regulations in computing appellant's transportation income and such failure constituted a violation of its due process rights under the Fourteenth Amendment. In response, the appellee maintains that his calculation of appellant's net transportation income was consistent with the regulation's guidelines and, even if it were not, his calculation was consistent with the intended subject of the tax.

Appellant submits that carrier tax regulations allow its use of federal taxable income as net transportation income in all instances when computing the West Virginia carrier net income tax. Appellant bases its argument on a portion of Section 1.3D of the Annual Tax on Incomes of Certain Carriers Regulations (ATC), which it quotes as follows: "Net transportation income is that income computed by federal guidelines without items of nontransportation income or expenses reflected therein." The text of (ATC) Regulation § 1.3D is set out in full on page 64A of the Appendix to appellant's Jurisdictional Statement. Prior to the portion quoted by appellant, such regulation addresses the computation of net transportation income as follows: "Net transportation income may be determined by employing those rules that are used to compute net income tax due the federal government." (Emphasis supplied.)

The appellee asserts that the regulation's language, when read in conjunction with the discretion granted the appellee by Chapter 11, Article 12A, Section 6(3), of the West Virginia Code of 1931, as amended, clearly notifies taxpayers that the Tax Commissioner is not bound by federal income tax figures when determining their carrier net income tax. The computation of transportation income may be based on federal taxable income only when federal net income is reflective of transportation income in the State during that year. Furthermore, due to the yearly nature of the carrier tax, a loss from another year cannot be properly considered a transportation expense associated with the tax year's transportation activities. The regulations require that only transportation expenses related to the transportation income of the tax year may properly be deducted in determining net transportation income.

Even if the regulation at issue could be interpreted as inconsistent with the Tax Commissioner's determination of the proper scope of Code 11-12A-3, which was judicially reviewed and approved, such regulation would be void. An administrative agency, by regulation, certainly may not extend the scope of a statute. For equally cogent reasons, the regulations of the agency may not restrict or alter the clear intent of the Legislature.

This Court in Dixon v. United States, 381 U.S. 68, 14 L. Ed. 2d 223, 85 S. Ct. 1301 (1965), recognized that a regulation which operates to create a rule out of harmony with the statute is a mere nullity. In said case, this Court held the Internal Revenue Tax Commissioner could not be precluded from collecting a tax lawfully due per statute because of a prior inconsistent position. In the current case, the West Virginia State Tax Commissioner cannot be prohibited from assessing and collecting a tax lawfully imposed because a regulation concerning the computation of the tax is inconsistent with the intended scope of the tax.

The West Virginia Supreme Court determined that West Virginia's carrier net income tax is a yearly tax calculated on the basis of transportation activity occurring during the tax year. The regulations administering such tax when examined in light of the scope of the tax are consistent with the proper subject of the tax. The West Virginia Supreme Court's decision, which sustains the Tax Commissioner's interpretation of the regulations, clearly rests on an adequate nonfederal basis and appellant's contentions do not merit review.

III.

THE DISALLOWANCE OF LOSS DISTRIBUTIONS, BY THE WEST VIRGINIA STATE TAX COMMISSIONER IN COMPUTING APPELLANT'S NET TRANSPORTATION INCOME FOR PURPOSES OF THE CARRIER NET INCOME TAX DOES NOT VIOLATE THE APPELLANT'S EQUAL PROTECTION GUARANTEES OF THE FOURTEENTH AMENDMENT.

Appellant contends that there is an interrelationship between West Virginia's carrier net income tax and the State's corporate net income tax, Code 11-24-1 et seq., which requires the computation of both taxes on the same basis to avoid an overall discriminatory effect. Appellee asserts that such a discriminatory effect could not occur and that the interrelationship appellant claims does not exist.

The West Virginia carrier net income tax and the West Virginia corporate net income tax are two separate and distinct taxes, each having different subjects. The carrier tax is a yearly tax levied upon the net income derived from in-State transportation activities conducted by both corporate and noncorporate entities. The corporate income tax is levied on the net income of corporations earned from all sources. The only interconnection between the taxes is a credit allowed against the corporate tax for carrier taxes paid. The corporate tax credit, provided for by Code 11-24-9, is also extended to any tax paid pursuant to West

Virginia's business and occupation and carrier gross income taxes.

West Virginia's carrier net income tax imposes a uniform tax on all types of passenger and freight hauling carriers. Each type is subjected to equal taxation within its classification. The fact that other kinds of businesses are subject to different state taxes, which allow various benefits or deductions, is irrelevant to the constitutionality of the carrier income tax. A state has considerable latitude in imposing general revenue taxes and the Equal Protection Clause does not prohibit the flexibility and variety that are appropriate to reasonable schemes of state taxation.

This Court in Allied Stores of Ohio v. Bowers, 358 U.S. 522, 3 L. Ed. 2d 480, 79 S. Ct. 437 (1959), recognized that a state may impose different specific taxes upon different trades and professions and only when a state's classification system does not have a rational basis or is arbitrary will it violate the Equal Protection Clause. An examination by this Court of West Virginia's carrier income tax will clearly show that the classifications drawn and imposition of the taxes therein are practical and rationally related to the diversifications of the transportation industry. All carriers are equally and uniformly taxed within their classification, and certainly all passenger and freight hauling railroad carriers, such as appellant, are evenly taxed.

The core of appellant's argument seems to be that there are other unidentified carriers subject only to West Virginia's corporate income tax who are allowed loss distributions which appellant is not permitted under the carrier net income tax. Upon such premise, the appellant bases its discrimination argument. In response, the appellee denies the existence of similarly situated carriers which are not subject to the State's carrier net income tax and submits that even if such carriers did exist, they would be subject to West Virginia's business and occupation tax which is measured on the basis of gross receipts. Therefore the theoretical carriers not subject to the carrier tax would not be allowed any type of deduction in computing their State business and occupation tax liability. Appellant's argument is factually unsupported and so indistinct as to be virtually unintelligible. Such argument is not worthy of the consideration of this Court.

IV.

WEST VIRGINIA'S CARRIER GROSS INCOME TAX, LEVIED ONLY UPON GROSS INCOME RESULTING FROM CARRIER BUSINESS BEGINNING AND ENDING IN-STATE, IS APPORTIONED EXACTLY TO THE ACTIVITIES TAXED, ALL OF WHICH ARE INTRASTATE, AND THEREFORE ITS EXACTION CANNOT CREATE AN UNCONSTITUTIONAL MULTIPLE TAX BURDEN ON INTERSTATE COMMERCE.

The decision of the West Virginia Supreme Court of Appeals in this matter found the appellant's income derived from exclusively in-State operations during the tax years 1970 through 1973 subject to West Virginia's carrier gross income tax. Chapter 11, Article 12A, Section 2, of the West Virginia Code of 1931, as amended, imposes the carrier gross income tax on specified carriers conducting "business beginning and ending within the State." The subject and measure of the tax relate to only business activities occurring totally in West Virginia. The tax is therefore apportioned exactly to the activities taxed, all of which are intrastate. See, Ficklen v. Shelby County Taxing District, 145 U.S. 1, 36 L. Ed. 601, 12 S. Ct. 810 (1892), and Standard Pressed Steel Co. v. State of Washington Department of Revenue, 419 U.S. 560, 42 L. Ed. 2d 719, 95 S. Ct. 706 (1975).

The State of Maryland during the same period levied a franchise tax, Maryland Code Ann., Article 81, Section

129 et seq., upon that portion of appellant's gross income derived from business conducted in Maryland. Said franchise tax's apportionment formula was analyzed by this Court in Canton Railroad Company v. Rogan, 340 U.S. 511, 95 L. Ed. 488, 71 S. Ct. 447 (1951). In that case this Court determined that the franchise tax was constitutionally structured since it was fairly apportioned to business done within the taxing state, Maryland, and did not reach income from any activities carried on beyond the borders of that state. The Maryland franchise tax, via its apportionment formula, is specifically designed to exclude from its measure income resulting from out-of-state business activities. The State of Maryland thus taxed only that portion of appellant's income attributable to Maryland business and all income earned from out-of-state operations, including income earned in West Virginia, was excluded.

Appellant's contention that the Maryland and West Virginia taxes at issue levy upon the same income and therefore create a constitutionally impermissible multiple burden is baseless and clearly invalid. Each state taxes only that portion of appellant's income associated with the in-state aspects of appellant's business conducted in that state. No portion of appellant's income is therefore subjected to duplicative taxation.

This Court in Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 3 L. Ed. 2d 421, 79 S. Ct. 357 (1959), recognized that when a tax is fairly apportioned, logically it is impossible to have the same income taxed twice. In Northwestern Cement this Court further noted that the entire income of a corporation, generated by interstate as well as intrastate activities, may be fairly apportioned among the states for tax purposes by formulas utilizing in-state aspects of interstate affairs. In the present case different portions of appellant's gross income were subjected to taxation by the State of West Virginia and the State of Maryland. No multiple burden did in fact exist nor could one have existed given the apportioned nature of the measure of each state's tax.

Although appellant did not raise the issue of multiple taxation before the West Virginia Supreme Court of Appeals, the following pronouncement by that Court in its decision represents the proper analysis of the possibility that the imposition of West Virginia's carrier gross income tax upon appellant's income could result in a multiple burden:

> "Finally, we note that since these activities of appellee [Western Maryland Railway Co.] take place wholly within West Virginia and they are identified by it as such, there is no chance that the State's imposition of this tax will lead to multiple taxation by another state of the same revenue source and thereby impose an unconstitutional burden on interstate commerce."

CONCLUSION

Counsel for the appellee, Herschel H. Rose III, West Virginia State Tax Commissioner, respectfully submits that the decision of the Supreme Court of Appeals of West Virginia is clearly correct; that this appeal does not present a substantial federal question; that the judgment below rests on an adequate nonfederal basis; and, that this Court should dismiss this appeal and affirm the decision below.

Respectfully submitted,

ROBERT DIGGES, JR.
Assistant Attorney General
for the State of West Virginia
State Capitol, W-435
Charleston, West Virginia 25305
(304) 348-2522

Counsel for Appellee
Herschel H. Rose, III

Of Counsel

CHAUNCEY H. BROWNING
Attorney General

JACK C. McCLUNG
Deputy Attorney General

E. WAYNE BASCONI
Assistant Attorney General

State Capitol
Charleston, West Virginia
25305